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THE LAW
OF
NEW JERSEY CORPORATIONS

THEIR ORGANIZATION AND MANAGEMENT

WITH THE TEXT OF THE STATUTES RELATING TO ALL
STOCK COMPANIES, EXCEPT BANKS, BUILDING AND
LOAN ASSOCIATIONS, CANAL, INSURANCE,
PLANK ROAD, PROVIDENT LOAN, SAFE
DEPOSIT, SURETY, TRUST AND
TURNPIKE COMPANIES.

WITH
FORMS AND PRECEDENTS.
IN TWO VOLUMES

BY JOHN S. PARKER.
OF THE NEW YORK BAR.

VOLUME I.

CHICAGO
CALLAGHAN & CO.,
1911

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PREFACE

The corporation laws of New Jersey have more than a mere local interest. For many years the state has been the favored habitat for industrial companies. These companies are doing business in every quarter of the globe. Their members are numbered in hundreds of thousands. The rights of these stockholders arise under and are enforced according to the New Jersey laws. It is obvious, therefore, that the statute and case law governing such corporations is of vital interest to lawyers everywhere.

For more than a hundred years the legislature has been struggling with the problems of corporate organization and regulation, and many questions have come up for adjudication in the courts. The result has been that a very complete body of corporation law has been built up. Not a harmonious system, not a perfect system, but still a system which has on the whole worked well, and under which the state has prospered. And although New Jersey has acquired a somewhat unenviable reputation as the creator of irresponsible corporations, the writer believes it is based upon a popular misapprehension of the law, due rather to the misdoings of some of her corporate creatures than to any radical defect in the system itself. Such criticisms as are entitled to weight have been not so much of the New Jersey corporation law as of individual New Jersey corporations. The law itself compares favorably with that of any other state, and particularly is this true in respect to the rules established for the protection of stockholders and creditors.

The general corporation act has served as a model for similar legislation in several of the other states. Its provisions represent the work of many legislatures, the decisions of many able judges and the revisory work of legislative commissions composed of eminent lawyers. Some of the other corporation acts have not been so carefully revised, and as to some classes of cor-

porations the statutes are mere congeries of incoherent and inconsistent provisions.

The judiciary of New Jersey has always been distinguished for its high character and learning, and the decisions of the courts have had a profound influence upon the development of American corporation law.

The present work is the result of over two years' labor on the part of the author. He has examined every volume of the reports, and he believes every important point under consideration in the cases has been stated. It has been his endeavor, in stating the law on any subject, to give as nearly as may be the exact language of the decision, and he has quoted liberally from the opinions of the judges. He has thus been able to throw much light on the origin and reason of the rules.

The author has refrained from expressing his own views, believing that in a practical work of this kind lawyers want to know only what the legislature and the courts have actually declared the law to be. He has, therefore, made no attempt to round out the work so as to treat of matters not covered by the statutes and cases, and for this reason the style may at times seem to be abrupt in passing from one subject to another.

In Part II is given the full text of the various statutes relating to the incorporation, management, control and taxation of the classes of stock companies included within the scope of the book. These have never before been printed in a single volume.

In Part III the most usual corporate forms are given, and in addition there will be found many valuable precedents of agreements for organization, charter clauses, mortgages and agreements securing bonds, reorganization papers, prospectuses and voting trusts. There is also inserted a very full bill in chancery by a stockholder to prevent the violation of charter rights.

The author desires to express his appreciation of the valuable assistance received by him in the preparation of this work from his associates, Messrs. Franklin A. Wagner and George Tumpson.

Acknowledgment is also due to Mr. William J. C. Berry, Librarian of the Mutual Life Law Library, for many courtesies extended.

JOHN S. PARKER.

Mutual Life Buildings, New York, April 15, 1911.

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PART I.

THE LAW OF NEW JERSEY IN RELATION TO CORPORATIONS HAVING CAPITAL STOCK.

I. INCORPORATION AND ORGANIZATION.

1. NATURE AND THEORY OF INCORPORATION.

In every system of law it has been found necessary, when the civilization of the particular society involved has reached a certain stage, to recognize as subjects of legal rights and duties "persons" who are not human beings.¹ The idea of artificial personality, it is true, has been traced back by Sir Henry Maine to the most primitive societies, when the family or tribe was the unit and the only unit recognized by law.² But the corporation as we know it is the product of a highly de-

1—"Every system of law that has attained a certain stage in its development seems compelled by the ever-increasing complexity of human affairs to add to the number of persons provided for it by the natural world, to create persons who are not men. Or rather, to speak with less generality and more historical accuracy, a time came when every system of law in western Europe adopted and turned to its own use an idea of non-human persons, ideal subjects of rights and duties, which was gradually discovered in the Roman law-books. From the nature of the case it is not often that jurisprudence can make a discovery comparable to the discoveries made by other sciences or other arts, for it has to await rather than to forestall the slow changes of common opinion. But here there is something that we may fairly call a discovery, though it was made by no one man and by no one age:—in order that the relationships between men may be adequately and succinctly stated, we must in thought institute a new order of persons, persons who are not men. We have become so familiar with this artifice of science that we have ceased to wonder at it:—when we are told by statute that the word 'person' is normally to include 'body politic'; that seems a very natural rule. The idea of a 'corporation aggregate' a 'body politic', has obviously been a powerful instrument in the hands of modern law." (Pollock and Maitland's History of English Law, Vol. I, p. 469.)

2—"The general idea of a corporation, a fictitious legal person, distinct from the actual persons who compose it, is very old. Blackstone ascribes to Numa Pompilius the honor of originating the idea. Angell and Ames are of the opinion that it was known to the Greeks, and that the Romans borrowed it from them. Sir Henry Maine, however, shows that primitive society was regarded by its members as made up of corporate bodies, that the units 'were not individuals but groups of men united by the reality or the fiction of blood relationship', and that the family, clan,

veloped and complex state of civilization. In Rome corporations did not exist until many centuries after the foundation of the city. In England they did not appear until the eleventh century, when the feudal system began to break up. Under that system, of course, based as it was upon the idea of personal fealty of natural persons to overlords of various degrees, the corporation could not in the nature of things exist. The first corporations in England were created for the very purpose of breaking into the feudal system of land holding to meet the needs of municipal, religious and trading associations.

Whatever the purpose of its creation the basic idea in each case has been that the corporation is a person distinct from its members, coming into existence as the result of the exercise of sovereign power. At first it was always created by the King in the exercise of the royal prerogative, the right to establish corporations being one of the *majora regalia* of the crown. In later days the legislature assumed the right to create corporations by special act, and at a still later day under general acts of incorporation. But whatever the mode of incorporation, the corporation as created was a person in the eyes of the law, with the right to own property, to enter into contractual relations with other persons and to sue in the courts.

In the early days of corporations, when the only individuals denoted by that name were religious bodies, municipalities and trade guilds, and when scholastic modes of thought prevailed among learned men, some absurd deductions were drawn from the recognized proposition that a corporation is a person. Analogies were drawn from the physical characteristics of natural persons. Corporations had "heads" and "members," terms which exist to this day. When either ceased to exist, the corporate body died. If the "head" were imprisoned the corporation itself became incapable of acting. Legal rules were thus made upon logical inferences based upon premises of the most absurd and fictitious character. When such modes of thought ceased to exist, the legal rules remained and had to be justified on new grounds. Then the "fiction" idea of corporate existence came in vogue and in theory though not in actual practice still prevails.

The modern legal concept of a corporation is that it is a juristic person, and jurists are now inclined to regard its existence as a reality rather than a mere fiction of law.³ It is of course true that there is

tribe, were recognized as distinct entities of society before individuals were."—Professor Williston, in *Select Essays in Anglo-American Legal History*, Vol. III, p. 195.

3—" * * * we constantly need in modern law the conception of an artificial person, a subject of duties and rights which is represented by one or more natural persons (generally, not necessarily, by more than one), but does not coincide with them. It has a continuous legal existence not necessarily depending upon any natural life; this legal continuity answers to some real continuity of public functions, or of special purposes recognized as having public utility, or of some lawful common interest of the natural persons concerned. There has been great specu-

no such objective reality in nature as a corporation, but in the administration of law natural objects are only of secondary importance. The law is concerned chiefly with the enforcement of rights, which are themselves intangible things existing only in legal contemplation. The fiction theory is, however, at times invoked by judges in giving the reasons for their conclusions.

Thus in *Stockton v. Central Railroad Company*,⁴ it was held that a lease of the franchises of a domestic railroad corporation made to another domestic railroad corporation organized and controlled in the interest of a foreign railroad corporation which was itself incapable of taking such lease, should be canceled. The court said:

"It follows from the conclusion reached, that the intervention of the Port Reading Company as nominal lessee is but a device to disguise the real nature of the transaction. * * * The misnomer of papers and the use of a nominal entity as nominal lessee does not change the substance of the transaction with which this court deals. The situation here may be summed up in the words of Vice-chancellor Kindersley in *Attorney-General v. Great Northern Railway Co.* (1 Drew & S. 157, 6 Jur. (N. S.) 1006, 29 L. J. 794), 'a more flimsy device, when the particulars are once known, it is impossible to imagine. It may succeed for a time in baffling persons who may have an interest in preventing its being done and has succeeded, but it was a mere crafty contrivance to evade the requisition of the law on the subject of joint stock companies.'

"It must not be thought that courts are powerless to strip off disguises that are designed to thwart the purposes of the law. The mere suggestion of such a condition is an insult to the intelligence of the judiciary. Whenever such disguises are made apparent they can readily be disrobed. The difficulty is in showing the disguises, not in penetrating them when they appear."

It will be found on examination of the cases that this theory is hardly ever invoked unless it is desired to deny the competency of a corporation to do certain acts. Within its competency, however, the personality of

lative controversy on the Continent of Europe, not without practical aspects, as to the true nature of corporate bodies. For a long time the prevailing theory was that the personality of a corporation was a mere legal fiction, and its rights derived in every case from a special creation by the State, even though the State's powers in that behalf might be delegated, or exercised in the form of general regulations. Closely associated with this doctrine is the assumption, which runs through the whole of Continental public law, that associations of any kind must not be formed without being authorized by the State. But of late years a contrary doctrine has been maintained by writers of considerable authority, and seems to be gaining ground, namely, that the legal existence or personality of a corporation, though limited in various ways, is quite as real as that of an individual. * * * I believe the 'realist' view to be the sounder." (Sir Frederick Pollock: *First Book of Jurisprudence*, p. 112.)

⁴—50 N. J. Eq. 52 (1892).

the corporate body is recognized to the fullest extent. Thus, said Chief Justice Green in *Assurance Co. ads. Cole*:⁵

"Nothing is more clear than the distinction existing in law between the person of the corporation and that of the individual corporators. A corporation, says Mr. Kyd, is a political person, capable, like a natural person, of enjoying a variety of franchises. It is vested, by the policy of the law, with a capacity of acting in several respects as an individual, particularly of taking and granting property, contracting obligations, and of suing and being sued. The great object of an incorporation is to bestow the character and properties of personality and individuality upon the legal entity called the corporation, as distinct from the persons of the corporators. And the power of suing and being sued as a person in its corporate name is one of the inherent capacities of every corporation at common law, as well as by statute.

"As a result of this principle, a contract by a corporation does not bind the individual corporators. A judgment against a corporation is no lien upon the property of the corporators. In a suit by a corporation the individual corporators are not liable to be served with process, nor are they answerable for costs. In actions by and against corporations, the declarations of corporators are not admissible in evidence against the corporation as the declarations of parties."

And in another case in the Supreme Court, the judge writing for the court said:

"Where a corporation is a party to the record, neither the president, the secretary, the individual directors nor stockholders are parties to the action. A corporation has a distinct legal existence as a person, or party capable of suing and being sued, and process against it brings only such artificial body into the court. By statute, process may be served on some designated officers of the company, but such service brings the corporation, and not the individual served, into court. The officers of a corporation are but its agents, who represent it in the discharge of its purposes, within the limits prescribed to each, and being such limited agents, they do not stand upon the record as principals or parties to the action. The party is the person for whose immediate interest the suit is prosecuted, and whose name appears on the record."⁶

So also, in *Conway v. Halsey*,⁷ Chief Justice Beasley said: "A corporation is a distinct person in law, in whom all the corporate property is vested."

The franchise of acting as a corporation can be granted only by the legislature. In *Seely v. Schenck*,⁸ Chief Justice Kirkpatrick said:

"Men associating themselves together for trade and commerce, and other lawful purposes, it is true, may assume a name, under which they

5—26 N. J. L. 362 (1857).

6—*Apperson v. Mutual Benefit Life Ins. Co.*, 38 N. J. L. 272 (1876).

7—44 N. J. L. 462 (1882).

8—2 N. J. L. 71 (1806).

may carry on their business. * * * But by this assumed name, they cannot appear in a court of justice. They can neither sue nor be sued by it. This is a privilege appertaining to corporate bodies only. A contrary doctrine would carry with it, a power to any number of individuals to associate themselves together under an assumed name, many, if not all the privileges of bodies corporate, created by law. This is contrary to the policy of our civil institutions. To sue and to be sued in their corporate name, is one of the great privileges always granted to corporate bodies. It can only be authorized by the supreme power of the state."

While the distinction between the corporation and its members is always observed in courts of law, the court of chancery will when justice demands recognize and apply the principle that the stockholders are the real owners of the corporate property. Vice-Chancellor Pitney stated the rule as follows:

"Our trading corporations and all their assets belong to the actual stockholders and not to the directors. The stockholders or shareholders are the actual and beneficial owners. The artificial entity—the corporation—is a mere shell legalized and adopted for the purpose of securing perpetual succession and convenience in the division and transfer of ownership. The corporation affairs, indeed, are managed wholly by the directors, who are chosen by and represent the owners and derive their power wholly from them. In actual practice these owners are powerless to control and manage their property except through their directors. In fact, the scheme of corporate management is that of a representative government, in which the representatives are bound to be governed by and represent only the interests of those they represent. Hence, any device or practice which in anywise or to any degree diminishes or prevents the exercise of the right of each of the actual owners to have a voice in the election of directors precisely in proportion to the amount of his interest, is vicious, and in positive contravention of the fundamental principle upon which our corporations are built up."⁹

But in cases in courts of equity, the corporate entity is recognized:

"It is urged, however, that in this case the corporation was but a mere form which the partners gave to what was in fact only a copartnership, and that this court is therefore at liberty to treat and deal with it as a copartnership. The bill alleges that the corporation is a quasi partnership. It appears by the answer that a partnership was at first agreed upon between the parties, but it was afterwards agreed between them to form a corporation instead. It is entirely clear that the court in dealing with the subject must treat the company as a corporation, and it cannot, in order to acquire jurisdiction over it to dissolve it, disregard and ignore its form and character."¹⁰

⁹—O'Connor v. International Silver Co., 68 N. J. Eq. 67 (1904).

¹⁰—Einstein v. Rosenfeld, 38 N. J. Eq. 309 (1884). See also Sternberg v. Wolff, 56 N. J. Eq. 389 (1897); 56 N. J. Eq. 555 (1898).

And in a recent case the late Judge Dill, in the court of Errors and Appeals, said:

"It is fundamental that, no matter how the shares of stock are held, the corporation itself is an entity wholly separate and distinct from the individuals who compose and control it. The complainant and the defendant, though owning the entire capital stock of the two corporations, are not, as expressed by Chief Justice Waite in the leading case of *Pullman's Palace Car Co. v. Missouri Pacific Ry. Co.*, 115 U. S. 587, 6 Sup. Ct. 194, 29 L. Ed. 499, 'the corporation, in the sense of that term as applied to the management of the corporate business or the control of the corporate property.' The law never contemplated that persons engaged in business as partners may incorporate, with intent to obtain the advantages and immunities of a corporate form, and then, Proteus like, become at will a copartnership or a corporation, as the exigencies or purposes of their joint enterprise may from time to time require. The policy of the law is to the contrary. If the parties have the rights of partners, they have the duties and liabilities imposed by law, and are responsible in solido to all creditors. If they adopt the corporate form with the corporate shield extended over them to protect them against personal liability, they cease to be partners, and have only the rights, duties, and obligations of stockholders. They cannot be partners inter sese and a corporation as to the rest of the world. Furthermore, upon grounds of public policy, the doctrine contended for cannot be tolerated, as it renders nugatory and void the authority of the Legislature—a co-ordinate branch of the government—established by the Constitution, in respect to the creation, supervision, and winding up of corporations. These views are amply sustained by abundant authority. 'A corporation is a legal person just as much as an individual,' said the Court in *Sheffield, etc., Bldg. Society*, 22 Q. B. D. 476. And in *Society v. Abbott*, 2 Beav. 567, Lord Langdale, M. R., held that, as in this case, great confusion arises by failure to distinguish the body corporate from the individuals who constitute, 'not the corporation, but all the members of the corporation.' The doctrine repeatedly urged by the complainant and adopted by the Vice Chancellor, viz., that 'the English and Illinois corporations were respectively agencies by which they' (*Jackson and Hooper*) 'accomplished their results' was expressly repudiated by the House of Lords in *Salomon v. Salomon & Co., Ltd.* (45 Weekly Reporter, p. 193; L. R. App. Cas. 1897, p. 22), where Lord Halsbury met this argument, saying: 'I will for the sake of argument assume the proposition that the Court of Appeals lays down, that the formation of the company was a mere scheme to enable Salomon to carry on business in the name of the company. * * * Either the limited company was a legal entity or it was not. If it was, the business belonged to it and not to Salomon. If it was not, there was no person and no thing to be an agent at all; and it is impossible to say at the same time that there is and there is not a company.' And Lord Macnaghten thus concurred: 'The company is at law a different person altogether from the subscrib-

ers to the memorandum; and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them.' Two years earlier, Lindley, L. J., asserted the same rule in the case of *Newman & Co.*, 1895, 1 Ch. 674, 685. 'It is true that this company was a small one, and is what is called a private company, but its corporate capacity cannot be ignored. Those who form such companies obtain great advantages, but accompanied by some disadvantages. * * * An incorporated company's assets are its property, and not the property of the shareholders for the time being. * * * The court is bound to recognize the company as incorporated, and to give effect to all the consequences of such incorporation.' " 11

The tendency of modern adjudications has been, as far as practicable, to treat corporations as natural persons. They are now held liable as individuals, civilly and criminally, for torts committed by their agents or servants, while they are held amenable to the law for all injuries inflicted by their wrongful acts. "They should, upon principles of even-handed justice, be held entitled to its protection for all injuries suffered by them at the hands of others." 12

Whether an aggregation of individuals, united in an artificial body, is a corporation or not, is to be determined rather by the faculties and powers conferred upon the body than by the name or description given to it. Thus it was held that a joint stock company or association formed under the laws of the state of New York is a corporation within the meaning of the provision of the Practice act relating to the mode of serving process in actions at law.¹³

And in *Tide Water Pipe Company v. Assessors*,¹⁴ it was held by the Supreme Court, in construing the Franchise Tax act, that partnership associations organized under the Pennsylvania statute of June 2, 1874, are invested with the essential characteristics of corporations and may be taxed as corporations in this state.

In cases where it has not been changed by statute the common law rules in respect to corporations apply. In New Jersey it is the settled doctrine that the mere fact of there being no positive evidence of the adoption of any principle of the common law prior to the Revolution, will not be sufficient to exclude it, if in its nature it is adapted to our

11—*Jackson v. Hooper*, 75 Atl. 568 (Court of Errors & Appeals, 1910).

12—Chief Justice Green in *Trenton Mutual Life & Fire Insurance Co. v. Perrine*, 23 N. J. L. 402 (1852). "For the conception of a corporation as a legal person, a conception going back farther than can be definitely traced, involves necessarily the consequence that before the law the corporation shall be treated like any other person. To this consequence there is a necessary exception in regard to such rights and duties as require an actual person for their subject." Professor Williston in *Select Essays in Anglo-American Legal History*, Vol. III, p. 209.

13—*Edgeworth v. Wood*, 58 N. J. L. 463 (1896).

14—57 N. J. L. 516 (1895).

circumstances, and is not in opposition to the principles of our government. The presumption is, that all the common law, not directly repugnant to our republican form of government, and not changed by statute, was in full force. Before it can be admitted to have been disused or modified, there ought to be very convincing evidence that a contrary usage was universal and of long standing, adopted by the courts of this state as its peculiar common law.¹⁵

2. CLASSIFICATION OF CORPORATIONS.

The common law classification of corporations aggregate and sole is not now of practical importance, although in a recent case it was held that the purchaser of corporate franchises at a judicial sale, pursuant to Section 82 of the Corporation Act (P. L. 1881, p. 33; P. L. 1875, p. 41) is by virtue of the statute made a corporation sole.¹

The modern classification of corporations is based upon differences of function. The two great classes are public and private corporations, with a middle class (which strictly speaking, however, are private corporations with public functions or duties to perform) commonly known as quasi public corporations.

Public corporations are such as are created for political purposes. They are invested with subordinate legislative powers, to be exercised for local purposes connected with the public good. Their powers are subject to the control of the legislature, and the charters of such incorporations may be altered or repealed at the pleasure of the legislature. But a corporation is not public merely because its object is of a public character. "A bank created by the government for its own uses, and where the stock is exclusively owned by the government, is a public corporation. But a bank whose stock is owned by private persons is a private corporation, though its object and operation partake of a public nature, and though the government may have become a partner in the association by sharing with the corporators in the stock. The same thing may be said of insurance, canal, bridge, turnpike, and railroad companies. The uses may, in a certain sense, be called public, but the corporations are private equally as if vested in a single person. This is clearly the American doctrine, though a different classification appears to be adopted in England."²

Private corporations may be divided into two great classes:

1. Non-stock corporations, including religious associations, social organizations, etc.; this class being also sometimes called membership corporations.

2. Corporations having a capital stock divided into shares, created for business purposes, commonly called stock companies.

15—*Bell v. Gough*, 23 N. J. L. 624 (Court of Errors & Appeals, 1852).

1—*McCarter v. Vineland Light & Power Co.*, 73 N. J. Eq. 703 (Court of Errors & Appeals, 1907).

2—*Tinsman v. Belvidere Delaware R. R. Co.*, 26 N. J. L. 148 (1857).

Stock companies are divided into two great classes based on their relations to the public and to the state:

1. Public service corporations so called (including railroad companies, street railway companies, gas, electric light and water companies, etc.) and other corporations carrying on a business "affected with a public interest" (including banks, insurance companies, etc.).

2. Private business companies (including manufacturing and other industrial companies). In number as well as the amount of capital involved this class is the most important.

The distinction between these two classes is of the utmost importance both in respect to their statutory regulation and the application to their acts and the acts of their officers and members of the general rules of corporation law.

Another classification of practical importance is based on the mode of incorporation, involving also to some extent differences of statutory regulation. In this classification, being artificial, the line of distinction between public service and private business corporations is not clearly drawn. Thus, electric light and power companies and steam heat and power companies are incorporated under the General Corporation act. So far as this book is concerned, this statutory classification includes corporations formed under the following general incorporation acts:

- (a) General Corporation act (referred to hereafter as the Corporation Act).
- (b) Gas Companies act.
- (c) Land Improvement Companies act.
- (d) Navigation Companies act.
- (e) Partnership Associations act.
- (f) Power Companies act.
- (g) Railroad act.
- (h) Sewerage Companies act.
- (i) Street Railway and Traction Companies acts.
- (j) Telegraph and Telephone Companies act.
- (k) Water Companies act.
- (l) Workingmen's Co-operative Societies act.

The text of each of these acts will be found in Part II of this book.

3. INCORPORATION BY SPECIAL ACT; STATUS OF CORPORATIONS CREATED BY SPECIAL ACT.

The Constitution, as amended in 1875 (art. IV, § 7, par. II) provides that the legislature shall pass no special act conferring corporate powers, but they shall pass general laws under which corporations may be organized and corporate powers of every nature obtained, subject, nevertheless, to repeal or alteration at the will of the legislature.

From the organization of the state government until the constitutional amendments of 1875, which prohibited special laws for the purpose, many special charters were granted by the legislature conferring

corporate powers, many of which are still in existence. The earliest was the charter of the Society for the Establishment of Useful Manufactures, passed November 22d, 1791 (P. L. 1791, p. 730, § 17).

Many of these early charters were, by their terms or by implication under the rule of the Dartmouth College case, irrevocable, and in *New Jersey v. Yard*, 95 U. S. 104, the Supreme Court of the United States declared that notwithstanding the act of 1846 which provided that all charters thereafter granted were subject to amendment, alteration and repeal, it was competent for the state legislature to make an irrevocable contract, and that therefore, it was in every case a question whether it was intended to reserve to the state the right to repeal the contract at will.¹

An act which extends the period of existence of a corporation is a grant of corporate powers and if special is unconstitutional.²

4. INCORPORATION UNDER GENERAL ACTS.

Since the amendment of the Constitution in 1875 all corporations must be formed under general acts. A list of these acts, so far as the kinds of corporations treated in this book are concerned, is given in section 2 above. The Corporation act (An act concerning corporations [Revision of 1896]) is, however, more than an enabling act, as many of its provisions apply to all classes of private corporations. It is, in large measure, a codification of the corporation law of the state.

The general act gives to all corporations general corporate powers and all others necessary to their exercise. If these were not sufficient to effect the objects of the corporation recourse was formerly had to the legislature for a specific grant of power. The constitution providing that "the legislature shall pass no special act conferring corporate powers, but shall pass general laws under which corporations may be organized and corporate powers of every nature obtained," and the general Corporation act being, as it now stands, passed in obedience to the mandate of the Constitution, the certificate required by that act becomes the charter of the company and the equivalent of the former special act of the legislature.¹

The general corporation act is the residuary incorporating act, so to speak; that is to say, where provision is not made by any other general act for the incorporation of a company for a particular purpose, it may be effected under the former. And it would seem that where provision is made in another act, incorporation must be effected thereunder. So also where the legislature has specially regulated the exercise of the powers of a corporation by express provisions and express and implied

1—*Singer Manufacturing Co. v. Heppenheimer*, 58 N. J. L. 63 (Court of Errors & Appeals, 1896).

2—*Grey, Attorney-General v. Newark Plank Road Co.*, 65 N. J. L. 51 (1900); 65 N. J. L. 603 (Court of Errors & Appeals, 1901).

1—*Ellerman v. Chicago Junction Railways, etc., Co.*, 49 N. J. Eq. 217 (1891).

limitations in its charter, subsequent general enactments cannot operate as a repealer.²

A corporation may be organized under "An act to incorporate and regulate telegraph companies" and its supplements, to operate and condemn a route for a telephone line.³

5. PURPOSES OR OBJECTS FOR WHICH CORPORATIONS MAY BE CREATED UNDER GENERAL LAWS.

The corporation act provides¹ that:

"Upon executing, recording and filing a certificate pursuant to all the provisions of this act, three or more persons may become a corporation for any lawful purpose or purposes whatever, other than a savings bank, a building and loan association, an insurance company, a surety company, a railroad company, a telegraph company, a telephone company, a canal company, a turnpike company or other company which shall need to possess the right of taking and condemning lands in this state, or other than a corporation provided for by 'An act concerning banks and banking' (revision of 1899), or by 'An act concerning trust companies' (revision of 1899), or by 'An act concerning safe-deposit companies' (revision of 1899). It shall, however, be lawful to form a company hereunder for the purpose of constructing, maintaining and operating railroads, telephone or telegraph lines outside of this state; provided, that any company organized under the provisions of this act for cremation purposes shall, before beginning business, file a certified copy of its certificate of incorporation with the state board of health and obtain from said board a license to carry on said business, under such rules and regulations as said board may prescribe."

The exceptions stated are not, however, the only exceptions.

It has been repeatedly held by the Supreme Court that where the legislature passes separate acts providing for the organization of certain classes of corporations (especially those owing duties and responsibilities to the public) under conditions inconsistent with or different from those prescribed by the General Corporation Act, the effect is to impliedly prohibit the organization of corporations of those classes under the latter act although there be no expressed prohibition in terms.²

Chancellor Pitney, however, in *State v. Atlantic City & S. R. Co.*, remarked that: "So far as observed this doctrine has not heretofore been directly in question in this Court, and we do not at present propose to pass upon its soundness or its precise limitation if sound."

2—*Robotham v. Prudential Insurance Co.*, 64 N. J. Eq. 673 (1903). *State v. Minton*, 23 N. J. L. 529 (1852); *State v. Belvidere*, 25 N. J. L. 563 (1856); *State v. Mills*, 34 N. J. L. 177 (1870); *Vail v. Easton & Amboy Railroad Co.*, 44 N. J. L. 237 (1882).

3—*Duke v. Central New Jersey Telephone Co.*, 53 N. J. L. 341 (1891).

1—Section 6, as amended by P. L. 1907, p. 35.

2—*State v. Atlantic City & S. R. Co.*, 77 N. J. L. 465 (Court of Errors & Appeals, 1909); *Montclair Military Academy v. Assessors*, 65 N. J. L. 516 (1900).

In *Fogg v. Ocean City*,³ the court said that the act of 1896 is only a revision of statutes existing at the time of its passage, and although it provides that companies may be formed thereunder for any lawful purpose, that language has no broader scope than it had in the act of 1875, as amended in 1888, and the passage of acts amending other general incorporation acts indicates that it was the legislative intent that corporations for the purposes provided for in such other acts must continue to be formed under such acts. And in that case it was held that a sewer company cannot be formed under the general Corporation Act.

In *Attorney General v. Hudson Co. Water Co.*,⁴ the Court of Errors and Appeals held that notwithstanding water companies (for the purpose of diverting water from streams and storing and selling the water thus diverted), are not within the express prohibition of the proviso to Section 6 of the Corporation Act either as originally enacted or as amended in 1899, "It seems reasonably clear that it was not the legislative intent that the incorporation of such companies was to be permitted under those acts. The exclusion of the express authorization of such companies that resulted from the repealer of the act of 1875 and its supplements, and the express exclusion, in the act of 1896 of companies needing to possess the right to condemn lands in this state, are circumstances that point in this direction. The appellant's charter, therefore, confers no power to divert water from streams, and to sell the same, beyond the mere power to engage in 'any lawful business.'"

In *Domestic Telegraph Co. v. Newark*,⁵ it was held that a telegraph company cannot be formed under the corporation act.

In *Richards v. Dover*,⁶ it was held that a water company cannot be formed under the corporation act.

In *Montclair Military Academy v. Assessors*,⁷ Mr. Justice Collins expressed a doubt as to whether an educational institution may legally be organized under the General Corporation act in as much as there are other general statutes providing for the incorporation of societies for the promotion of learning—some of them authorizing capital stock. "The legislature has since undertaken to repeal those statutes, but under a title that, as to some of them, may be inefficacious. (P. L. 1899, p. 189.) In 1895 they were in full force and it is arguable that the methods thereby prescribed of obtaining corporate existence were exclusive of others resting in the omnibus clause of the General Corporation act authorizing incorporation for 'any lawful business or purpose whatever.'"

In *McCarter, Attorney General, v. Imperial Trustee Co.*,⁸ the provi-

3—74 N. J. L. 362 (1907).

4—70 N. J. Eq. 695 (1906).

5—49 N. J. L. 344 (1887).

6—61 N. J. L. 400 (1898).

7—65 N. J. L. 516 (1900).

8—72 N. J. L. 42 (1905).

sions of the objects clauses of a certificate of incorporation filed under the general corporation act were considered and held to be in violation of the prohibitions of sections 6 and 3 in respect to banking and trust company powers.

Subject to these express and implied limitations, the language of section 6 is given full force and effect. Thus in *Dittman v. Distilling Co. of America*,⁹ it was held that a corporation created for the purpose of holding stock and controlling the operations of other corporations, was organized for "a lawful purpose," within the meaning of the Corporation act, and was entitled to purchase and hold such stock. Vice-Chancellor Emery said: "The ownership of stock and control of corporations by means of such ownership by either an individual or partnership is in general a lawful act, and the organization of a partnership for the purpose of such ownership and control, either alone or in connection with other objects, is unquestionably a lawful object or purpose of association of individuals. The only theory upon which the formation of corporations for the purpose of holding stock of other corporations can be held not to be a 'lawful purpose,' within the meaning of the act, is that an authority to own the stock and control the management of other corporations must be given expressly and in terms in the section authorizing the formation of companies in order to be lawful. This power to own and control stock of other corporations is expressly given, by a subsequent section, to all corporations when organized, and to the same extent as individuals; such ownership of stock is therefore a lawful act. This legislative declaration as to the lawfulness of the ownership of stock by corporations precludes the courts, as it seems to me, from declaring that such ownership cannot be included within the 'lawful purposes' for which a corporation may be formed merely for the reason that it is not expressly and specially authorized in the section of the act defining the purposes of incorporation. What purposes are 'lawful' within the meaning of this section must be ascertained by reference to the scope of the laws in force declaring the lawful character of acts, and taking the whole scope of the act it would seem that the ownership of stock in other corporations, either alone or in connection with other objects as the purpose of the corporation, is a purpose of incorporation authorized by the act."

The purpose, however, must be a lawful one, and a statute enacted in 1905¹⁰ provides that "any person or persons who shall organize or incorporate, or procure to be organized or incorporated, any corporation or body corporate under the laws of this state, with intent thereby to further promote or conduct any fraudulent or unlawful object, shall be guilty of misdemeanor."

As to the purposes for which corporations may be formed under the other general acts, see Part II of this book.

⁹—64 N. J. Eq. 537 (1903).

¹⁰—P. L. 1905, p. 257.

6. RIGHT TO INCORPORATE; STATUTORY QUALIFICATIONS OF INCORPORATORS.

The right to incorporate under the general incorporation acts is usually accorded to all persons who conform to the statutory provisions. Incorporators under the general corporation act are not required to be residents of the state, nor are they required to be citizens of the United States. Each incorporator must be a subscriber for at least one share of stock. As to the qualifications of incorporators of other classes of corporations, see Part II of this book.

The right to form a water company under the act of April 21, 1876, however, is conditioned upon the consent of the corporate authorities of the municipality being first obtained. The court said: "In conferring power on the corporate authorities to consent, and in prescribing that their consent should be necessary to the incorporation of such a company, it is obvious that the legislative intent was to cast upon the representatives of the municipality the duty of determining whether the company proposed to be formed for a purpose of great public interest should be formed or not. Such a determination can only be made on considering who propose to form the company and on what terms it is to be organized. The consent required is, therefore, not a consent to the formation of any company, but of the company proposed by the persons and in the manner proposed. The corporate authorities may refuse to consent, and they may consent to the formation of more than one company. Such consent may doubtless be given by an ordinance and evidenced by a written consent executed by officers deputed for that purpose. The written consent must conform to the consent given by the ordinance. The ordinance must contain such a consent as the act requires."¹

7. MODE OF FORMING CORPORATIONS UNDER GENERAL ACT.

The procedure incident to the formation and organization of a corporation under the general Corporation act is very simple. The successive steps are as follows:

First. Prepare a certificate of incorporation and have the same signed and acknowledged by all the subscribers to the capital stock named therein. These should be natural persons, twenty-one years of age or over, three or more in number. The signatures of the incorporators should be attested by a subscribing witness, and the execution of the certificate must be acknowledged. If executed in New Jersey, the acknowledgment may be taken by a master in chancery, an attorney-at-law, commissioner of deeds or other officer authorized by law to take the acknowledgment and proof of deeds, but may not be taken by a notary public.

¹—Tyler v. Plainfield, 54 N. J. L. 526 (1892); see also Davis v. Harrison, 46 N. J. L. 79 (1884); Kemble v. Millville, 69 N. J. L. 637 (Court of Errors & Appeals, 1903).

If executed out of New Jersey, the acknowledgment may be taken by a master in chancery or foreign commissioner of deeds for New Jersey or by a notary public or other officer authorized to take the acknowledgment and proof of deeds in such state. If not taken by a master in chancery or foreign commissioner a certificate of a clerk of a court of record, under the seal of such court, must be attached, certifying to the officer's authority and to the genuineness of his signature. (See form of certificate in Part III of this book.

Second. The original and one copy of the certificate of incorporation should be taken to the office of the county clerk of the county in which the principal office is to be located, and upon comparing the copy with the original the county clerk will stamp the original as recorded and return the same, and make his record from the copy. The recording fee is usually from \$3.50 up according to the length of the instrument.

Third. The original certificate of incorporation, with the other copy, should be sent to the secretary of state at Trenton, with the organization fee, the recording fee and \$1 to cover cost of certifying the copy. If the certificate conforms with the law, the secretary of state will file the original, and return to the sender the copy certified by him.

Fourth. It is customary to immediately hold the first meeting of incorporators, either in person or by proxy, at the principal office within the state, for the purpose of adopting by-laws, electing directors, etc.

Fifth. The newly elected directors may then meet, within or without the state, for the purpose of electing officers, purchasing property, etc., and perfecting the organization.

For the procedure in relation to the incorporation of other kinds of corporations, see Part II of this book.

8. THE CERTIFICATE OF INCORPORATION.

As to corporations formed under the Corporation act, the statute provides (§ 8) that the certificate of incorporation shall be signed in person by all the subscribers to the capital stock named therein and shall set forth:

1. The name of the corporation; no name shall be assumed already in use by another existing corporation of this state, or so nearly similar thereto as to lead to uncertainty or confusion;

2. The location (town or city, street and number, if number there be) of its principal office in the state;

3. The object or objects for which the corporation is formed;

4. The amount of the total authorized capital stock of the corporation, which shall not be less than two thousand dollars, the number of shares into which the same is divided and the par value of each share; the amount of capital stock with which it will commence business, which shall not be less than one thousand dollars; and, if there be more than one class of stock created by the certificate of incorporation, a description of the different classes, with the terms on which the respective classes of stock are created;

5. The names and post-office address of the incorporators and the number of shares subscribed for by each; the aggregate of such subscriptions shall be the amount of capital stock with which the company will commence business, and shall be at least one thousand dollars;

6. The period, if any, limited for the duration of the company;

7. The certificate of incorporation may also contain any provision which the incorporators may choose to insert, for the regulation of the business and for the conduct of the affairs of the corporation, and any provision creating, defining, limiting and regulating the powers of the corporation, the directors and the stockholders, or any class or classes of stockholders; provided, such provision be not inconsistent with this act.

The most important of these provisions is the one relating to the objects of the corporation.

"The Corporation Act and Railroad Act are not exceptional in requiring that the objects of the proposed company shall be stated in the certificate of incorporation and that this certificate shall be made a matter of public record. Numerous other acts providing for the incorporation of different kinds of companies contain similar provisions. The legislative purpose is to preserve for the benefit of the people and the private parties concerned, solemn evidence of the corporate powers that have been granted, of the contract made between the state and the corporation, and of the contract made by the corporators *inter sese*. It is only by reference to the certificate of incorporation that the Attorney General and other officers interested in behalf of the state can readily determine what powers have been granted and what have not been granted, and whether the company is usurping franchises not granted by the state. It is by reference to the articles of association that investors can conveniently ascertain the character of the contract into which they are entering and the probable rights they are acquiring by purchasing stock of the company."¹

The certificate of incorporation to the extent of the provisions lawfully contained therein is a contract between the company and the stockholders.²

In construing this paragraph of a certificate of incorporation, in *Ellerman v. Chicago Junction Railways, etc., Co.*,³ Vice-Chancellor Green said:

"The powers of the company involved in this controversy, as ascertained from the third paragraph of the certificate, are (1) to purchase, hold, pledge, transfer, sell or otherwise dispose of or deal in shares of the capital stock of the Transit Company; (3) to exercise in respect to said shares any and all the the rights, powers and privileges of owners of shares of said capital stock; (5) to do any and all acts and things

1—Chancellor Pitney in *State v. Atlantic City & S. R. Co.*, 77 N. J. L. 465 (Court of Errors & Appeals, 1909).

2—*Brown, Receiver v. Morton*, 71 N. J. L. 26 (1904).

3—49 N. J. Eq. 217 (1891).

tending to increase the value of the shares of the capital stock of said company; (7) and in the promotion of its corporate business, to purchase, receive, hold and dispose of any securities of any person or corporation, whether such securities shall be bonds, mortgages, debentures, notes or shares of capital stock, and in respect of any such securities to exercise all and any of the rights and privileges of owners thereof, and to the extent authorized by law, to lease, purchase, hold, sell, assign, mortgage and convey real and personal property of any name and nature.

"As I understand, the learned counsel of the complainant, in his argument, insists that the agreement does not come fairly within any part of paragraph 3 of the certificate, which can be considered as a statement of objects within the contemplation of the law.

"The argument is that the clauses 'to exercise in respect to said shares the rights, powers and privileges of owners of the stock,' and 'to do any acts and things tending to increase the value of the shares,' read in connection with that authorizing the company to deal in said stock, confines the operations of the company to transactions in the shares of stock as such; that as owner of the stock it has the power to exercise with respect thereto the rights of owners without any such declaration, and that the clauses relating to the doing of any act tending to increase the value of the stock, if not limited to the handling and operation of shares in dealing therein, is too indefinite to be considered as the proper statement of an object of the corporation. This contention limits the objects of the Junction Company practically to the buying and selling of the stock of the Transit Company. * * * If such were alone the object of the promoters of the company, there would be no occasion to incorporate for such purpose, or, if they did so, to have done more than use the first subdivision of paragraph 3. The general object of the corporation is to be gathered not from any one of the specifications, but from the whole of the paragraph. It is not simply to deal in the Transit Company's stock, but to own and hold it and to increase its value, not by operations in the market, but by the exercise of auxiliary corporate acts which possibly it was not within the power of the Transit Company to exercise. It is said that a statement to do any and all acts tending to increase the value of the stock is too indefinite to be considered as the statement of an object of incorporation, as required by the statute; that there must be something specific stated, and it is asked, can such recital really confer any corporate power? And if so, what is the limit of its exercise? If it was a declaration of power to do any and all acts tending to increase the value of its own stock it would certainly be without effect.⁴ It would be either surplusage, or else too indefinite to be considered as a statement of a purpose, as required by law, because, first, so far as any authorized acts are concerned, the company would possess the right to do them

⁴—Re Crown Bank, 44 Ch. D. 634.

without such statement, and, second, it could confer no other powers because the law requiring the objects to be named must mean they should at least be indicated; but here the stock referred to, to be benefited, is not the stock of the Junction Company, but the stock of another, namely, the Transit Company; the statement is that the Junction Company shall have the power to do acts tending to increase the value of the stock, not its own, but that of the Transit Company, and it seems to me that such clause may be fairly construed to authorize such acts tending to increase the value of that stock, as fall within recognized lawful corporate powers—those not against the policy of the law, which are germane to the general purposes of the corporation, and are specially enumerated in the certificate, or are incident thereto.⁵ The recital in the certificate anticipates and answers the question and objection asked and urged by the complainant, viz: how can the funds of the Junction Company be used for the direct benefit of the stock of another, namely, the Transit Company, and only indirectly to the benefit of the Junction Company as a stockholder of the company directly benefited? For such recital expressly confers such power. * * * As amended, the Corporation act permits incorporations not only for objects specified therein, but for 'any lawful business or purpose whatsoever,' which general clause is not, however, to be construed as embracing powers to do those things which would deprive the corporation of its ability to carry out the objects for which it was formed, or discharge any duties which it might, under its charter, owe to the public, or which are contrary to the policy of the law.⁶

"By the statement, therefore, in the certificate of incorporation of the desired powers under the head of objects of the corporation, the special powers are obtained, and, as incident thereto, such others as may be necessary for their exercise. So that the general Corporation act confers on the company certain powers, the certificate contemplates others and incidental powers follow not only with respect of the general but also of the special powers."⁷

The eighth paragraph is also of importance. Thus a provision in a certificate that "After payment of \$10 per share on the preferred stock, the subscribers thereto shall not be liable for any balance of their subscription excepting upon such shares as shall stand of record on the books of the company in their names at the time when any subsequent assessment or calls are made, but the holder of such shares of record on the books of the company at that time, and they only, shall be liable for the same," was held to be not inconsistent with the statute, and a registered holder of stock was held liable upon a call made after he had sold

5—*Simpson v. Westminster P. H. Co.*, 8 H. L. Cas. 712; *Peruvian Railways Co. v. Ins. Co.*, L. R. (2 Ch. Div.) 617; *Studdert v. Grosvenor*, 33 Ch. Div. 528; *Henderson v. Bank*, 40 Ch. Div. 170.

6—*Oregon Ry. Co. v. Oregonian Ry. Co.*, 130 U. S. 1.

7—*Ellerman v. Chicago Junction Railways, etc., Co.*, 49 N. J. Eq. 217 (1891).

and transferred his stock, but before the transfer had been registered on the company's books.⁸

In the absence of proof to the contrary, creditors of a corporation are presumed to act on the information contained in the certificate of incorporation and other records relating to the corporation, in the office of the secretary of the state.⁹

9. ORGANIZATION OF THE CORPORATION; MEETINGS OF INCORPORATORS AND DIRECTORS.

The statute provides that the first meeting of every corporation shall be called by a notice, signed by a majority of the incorporators, designating the time, place and purpose of the meeting, which notice shall be published at least two weeks before the meeting in some newspaper of the county where the corporation is established; or said first meeting may be called without publication if two days' notice be personally served on all the incorporators; or if all the incorporators shall, in writing, waive notice and fix a time and place of meeting, no notice or publication shall be required.¹

This meeting is usually held pursuant to a written waiver of notice signed by all of the incorporators.

When one or more of the incorporators shall have died before the corporation shall have been organized pursuant to law, the survivors or survivor may in writing designate other persons who may take the place and act instead of those deceased, in the organization; and the organization so effected by their aid shall be as effectual in law as if it had been effected by all the original commissioners or incorporators.²

At this meeting by-laws are adopted and the first board of directors is elected. Sometimes other business is transacted, e. g., the authorization of the purchase of property and the issue of stock in payment, but such action is wholly unwarranted by the act, and has no more force than a recommendation to the directors.

After the meeting of incorporators has been held the directors should meet. At this meeting officers are elected, shares of stock are authorized to be issued either for money or in payment of property purchased and routine business incident to organization is transacted.

Forms of minutes of organization meetings containing all matters of business usually transacted will be found in Part III of this book.

10. STATUTORY CONDITIONS AND REQUIREMENTS PRELIMINARY TO THE COMMENCEMENT OF BUSINESS.

In the case of a corporation formed under the Corporation Act the only condition to be complied with before commencing business is the

8—Brown, *Receiver v. Morton*, 71 N. J. Law, 26 (1904).

9—See *v. Heppenheimer*, 69 N. J. Eq. 36 (1905).

1—Corporation Act, § 16.

2—Corporation Act, § 115.

payment of the minimum amount of capital stated in the certificate (see § 8 above). As to other corporations see Part II of this book.

11. DEFECTIVE, IRREGULAR AND ABORTIVE INCORPORATION; DE FACTO CORPORATIONS.

The general rule is that the regularity and validity of the organization of a corporation, effected under color of its charter, cannot be impeached in any collateral proceeding, and that the acts of its officers, who are officers *de facto* under color of an election, are valid and binding upon the corporation. This doctrine has been applied to proceedings to enjoin a corporation from exercising its corporate franchises.¹ It is applied with the utmost liberality in favor of creditors and persons transacting business with the corporation in good faith, relying upon the acts of the corporation, and of its officers having an apparent authority to represent it.²

The Hackensack Water Company was incorporated in 1869, with a capital of \$50,000. The charter provided for an organization as soon as \$20,000 of the capital stock should be subscribed and paid in. In 1873 the corporation was organized and directors elected. Very little of the stock had been subscribed, and less of it had been paid in. The directors were not qualified for the office, and were irregularly chosen. Under this organization, the company bought and took title to lands in its own name, constructed its works, acquired property to a considerable amount, and contracted debts to a larger amount. On a bill to foreclose a mortgage made by the corporation, it was held that the corporation was a corporation *de facto* and its directors, officers *de facto*, and that the acts of the latter were binding on the corporation.³

The legality of a corporation, which exists under the form of law, can only be impugned by an application for a writ of *quo warranto*, or by an information in the nature thereof, instituted by the Attorney General.⁴ The Court of Errors and Appeals in an important case stated the rule as follows: "Whenever it is sought to impugn the legality of a corporation which exists under the forms of law, the remedy is by *quo warranto*, or information in the nature thereof, instituted by the

1—Attorney General v. Stevens, 1 N. J. Eq. 369 (1831); National Docks R. R. Co. v. Central R. R. Co., 32 N. J. Eq. 755 (Court of Errors & Appeals, 1880).

2—Hackensack Water Co. v. DeKay, 36 N. J. Eq. 548 (Court of Errors & Appeals, 1883).

3—Hackensack Water Co. v. DeKay, 36 N. J. Eq. 548 (Court of Errors & Appeals, 1883).

4—West Jersey R. R. Co. v. Cape May, etc., R. R. Co., 34 N. J. Eq. 164 (1881); Muller v. Egg Harbor City, 55 N. J. L. 245 (1893); Campbell v. Perth Amboy Shipbuilding Co., 70 N. J. Eq. 40 (1905); *affd.* 71 N. J. Eq. 302 (Court of Errors & Appeals, 1906); Camden & Atlantic R. R. Co. v. May's Landing, etc., Co., 48 N. J. L. 530 (Court of Errors & Appeals, 1886). But there must be a colorable organization to estop a person dealing with individuals purporting to act as a corporation. Cottentin v. Meyer, 76 Atl. 341 (1910).

Attorney General. Said Ashhurst, J., in *Rex v. Pasmore*, 3 T. R. 199 (244): 'A *quo warranto* is necessary where there is a body corporate *de facto*, who take upon themselves to act as a body corporate, but, from some defect in their constitution, they cannot legally exercise the powers they affect to use.' And, in *Rex v. Corporation of Carmarthen*, 2 Burr. 869, it was asserted by Lord Mansfield and Mr. Justice Denison, and conceded by all the counsel, 'that there was no instance of any information in nature of a *quo warranto* being brought against any corporation, as a corporation, for an usurpation on the crown, but by and in the name of the Attorney General, on behalf of the crown.' These views are approved in *State v. Patterson & Hamburg Turnpike Co.*, 1 Zab. 9, and are maintained and applied in numerous cases cited in the text books on this subject. We think they are accurate statements of the law applicable to the case in hand." And the court held that when a corporation exists *de facto*, the Court of Chancery cannot, at the instance of private parties, restrain its operations upon the ground that its organization is not *de jure*.⁵

In *Vanneman v. Young*,⁶ the certificate of incorporation was recorded in the Clerk's office, but was not filed in the Secretary of State's office until nearly a year later. Prior to such filing, the plaintiff sold to the Clayton Bottle Works, as a corporation, certain materials which were used in its business. Subsequently, the plaintiff brought suit for the price against those persons who had associated themselves for the formation of a company, insisting that, as the certificate had not been filed with the Secretary of State at the time of the purchase, the incorporation had not taken place, and, therefore, the associates were liable as partners. The statute at that time provided that "upon making said certificate and causing the same to be recorded and filed as aforesaid, the said persons so associating, their successors and assigns, shall be, from the time of commencement fixed in said certificate and until the time limited therein for the termination thereof, incorporated into a company, by the name mentioned in said certificate." The Court of Errors and Appeals said: "The statute above mentioned authorized the incorporation of the associates. The bona fides of their attempt to incorporate themselves in accordance with its provisions is unquestioned, and the contract of the plaintiff was entered into upon the assumption that he was dealing with a corporation *de jure*. The failure of the associates to observe exactly the directions of the statute, did not in the least impair the rights which the plaintiff intended to secure by his contract. Under these circumstances, the plaintiff cannot bring into question the legality of the incorporation.

"Where the law authorizes a corporation, and there is an effort in good faith to organize a corporation under the law, and thereupon, as

5—*National Docks R. R. Co. v. Central R. R. Co.*, 32 N. J. Eq. 75 (Court of Errors & Appeals, 1880); see also *Attorney General v. Stevens*, 1 N. J. Eq. 369 (1831).

6—52 N. J. L. 403 (Court of Errors & Appeals, 1890).

a result of such effort, corporate functions are assumed and exercised, the organization becomes a corporation *de facto*, and, as a general rule, the legal existence of such a corporation cannot be inquired into collaterally, although some of the legal formalities may not have been complied with. Ordinarily, such an inquiry can only be made in a direct proceeding brought in the name of the state. * * * No private person having dealings with a *de facto* corporation can be permitted to say that it is not, also, a corporation *de jure*."

"But, in the second place, the recording and filing of the certificate are not made by the statute a condition precedent to the legal existence of the corporation; they are merely necessary evidence of such existence. That evidence being produced, the legal existence of the corporation, 'from the time of commencement fixed in said certificate,' is proved.

"In the present case, the time so fixed was anterior to the contract with the plaintiff, and hence it appeared at the trial that the plaintiff had sold his goods to a corporation *de jure*, and not to the defendants." 7

In the absence of a statutory provision making shareholders liable in case of failure to comply with the requirements of the charter, or with the requirements of the act under which the company is incorporated, persons who have contracted with a *de facto* corporation, as a corporation, cannot deny its corporate existence, in order to charge its shareholders individually as partners. Where it is shown that there is a charter or a law under which a corporation with the powers assumed may lawfully be incorporated, and there is a colorable compliance with the requirements of the charter or law, and a user of the rights claimed under the charter or law, the existence of a corporation *de facto* is established. And it is entirely settled that the corporate existence of such corporation *de facto* cannot be inquired into collaterally. It is, as to all who contract with it, to be assumed to be a corporation *de jure*. The legality of its corporate existence may be inquired into by the state, but not by anyone else. And this is as true where the corporation is formed under a general law as it is where the corporate existence is claimed under a special charter.⁸

There are two cases, often cited, in which the rule against collateral attack seems to have been disregarded. In the case of *Stout v. Zulick* the court said: "Nor are the cases [*Hill v. Beach*, 1 Beas. 31, and *Booth ads. Wonderly*, 36 N. J. L. 250] cited by the plaintiff's counsel, in anywise opposed to the views above expressed. In the former, persons who associated themselves together for the purpose of carrying on the quarrying business in this state, took proceedings to incorporate themselves into a company under a general corporation law of New York. They were held liable as partners, on the ground that they were not a

7—*Vanneman v. Young*, 52 N. J. L. 403 (Court of Errors & Appeals, 1890).

8—*Stout v. Zulick*, 48 N. J. L. 599 (Court of Errors & Appeals, 1886).

corporation, the Chancellor saying that they were not a domestic corporation and could not be sued as such, and that they were not a foreign corporation, for it was perfectly manifest upon the face of their proceedings that their attempted organization under the general law of New York was a fraud upon that law. In *Booth v. Wonderly*, persons who had got control of a special charter creating a corporation to be located in Trenton, but who were not named as incorporators therein, attempted to use it to establish a company under it, to be located at Jersey City, and to give such company a corporate color under that charter. The Court said that the company had some semblance of a corporation in name, form of organization, and assumption of a seal, yet not enough to give it a *de facto* corporate existence; that the attempt to establish the company in Jersey City under the charter was a palpable and entire perversion of the object of the act and a fraud upon the act; that it gave no corporate color to the company; that the doctrine that the organization cannot be inquired into collaterally had no application to that case, because the charter did not fit the company, and was not intended for it, and that the organization was entirely outside of the act and had no existence as a corporation, real or *de facto*. It will have been seen that in each case the *ratio decidendi* was that the pretended incorporation was a fraud upon the act under which the defendants claimed corporate existence.”⁹

In *Booth v. Wonderly*, a special act of the legislature chartered an insurance company to do business at Trenton, and certain parties, who appeared to have been mere usurpers, having no privity with the incorporators, attempted to organize the corporation thereunder at Jersey City. The Supreme Court, however, construed the charter to mean that the corporation was to be peculiarly a Trenton institution, and held that such attempt was a palpable and entire perversion of the object of the act, and must be held to be void. “It gave no corporate color to the company that the courts should recognize for the protection of those who were engaged in, and who lent themselves knowingly to the scheme. It was a fraud upon the act. The doctrine that the organization cannot be inquired into collaterally, has no application as the case stands, because the charter does not fit this company, and was not intended for it. The organization is entirely outside of the act, and has no existence as a corporation, real or *de facto*. The extent to which a corporate body under such a charter may contract in other places than where located is not in the case, with its present aspect. This is a question of power merely, while the question before us now is one of corporate existence. That the company was unincorporated, the court was warranted in assuming under the case as it appeared at the trial.” And the court held that those persons who have consented to become directors of such an unincorporated association, or knowingly allowed

⁹—*Stout v. Zulick*, 48 N. J. L. 599, 602 (Court of Errors & Appeals, 1886).

themselves to be held out to the world as directors, were responsible, as principals or partners, for all contracts, express or implied, within the scope of the business of the direction.

A certificate of acknowledgement which does not state that the person taking it first made known to the grantor mentioned the contents thereof, and was satisfied that he was the grantor mentioned in the deed, will not entitle a deed to be given in evidence without other proof. The statutory provision in respect to this is mandatory and not merely directory.¹⁰ But it is held that only the state can complain as to so formal a defect that a certificate of incorporation was not acknowledged or proved before a proper officer, or that it was defective in form.¹¹

A subscriber to the certificate of incorporation is liable to pay for the stock, to satisfy the claims of creditors, though he does not participate in the organization and though the corporation becomes merely a *de facto* corporation.¹² The court said: "The theory of the plaintiff in error that the subscription to pay is conditioned upon the formation and organization of a corporation *de jure* is utterly without substance. The execution of the certificate of incorporation constituted an express contract to contribute to the capital stock, and while it may be true that he did not personally participate to any great extent in the operation of the company * * * that does not in any way affect his liability upon his stock subscription."

In *McCarter, Receiver v. Ketcham*, the facts were as follows: The incorporators signed the Certificate of Incorporation, which was in the form required by law; the certificate was filed in the County Clerk's office; the incorporators met and adopted by-laws and elected a Board of Directors; the directors met and elected officers; the secretary took the oath of office; the bond of the treasurer was fixed and a bill of sale was made to the company of said property and stock authorized to be issued for the value of that property; the Board of Directors was authorized to call upon the stockholders for forty per cent of the stock subscribed to the company; the resignation of the secretary of the company was received and a successor elected; as a corporation, it afterwards filed an answer to a bill of complaint filed to set aside the bill of sale which it had received and resisted the making of a decree declaring that bill of sale a fraud upon the vendor's creditors. The certificate of incorporation was never filed in the office of the Secretary of State. The court held, however, that the company was a fully organized corporation *de facto*, and that a subscriber to its stock was liable for the unpaid amount of his subscription at the suit of a receiver appointed in insolv-

10—Pinckney and Bruen v. Burrage and Stephens, 31 N. J. L. 21 (1864).

11—National Docks Railroad Co. v. Central R. R. Co., 32 N. J. Eq. 755 (Court of Errors & Appeals, 1880); P. & C. Ferry Co. v. Intercity R. R. Co., 73 N. J. L. 86 (1905); Keyes v. Smith, 67 N. J. L. 190 (1901).

12—McCarter, Receiver v. Ketcham, 74 N. J. L. 825 (Court of Errors & Appeals, 1907).

ency proceedings. So also as a defense to an application by a receiver for an order authorizing an assessment on stockholders for unpaid subscriptions, the stockholders cannot set up the fact that the company never became a corporation *de jure*, or that the company never became a corporation *de facto*, or that the agreement to incorporate was abandoned and the subscriptions were canceled by the subscribers.¹³

As between the parties attempting to form the corporation, the rule is different. Thus where defendants entered into a written agreement with plaintiff wherein they agreed to incorporate a company upon the strength of which plaintiff contributed \$1,500 to defendants, and the corporation was never formed, in a suit by plaintiff to recover the amount paid, it was held that the consideration having failed, the defendants were liable under the agreement as joint contractors in an action of assumpsit.¹⁴

The direct attack must be made in the Supreme Court and not in the court of chancery. A court of equity does not possess power to restrain a corporation, organized under the forms of law, from performing acts within its corporate power merely because some of the steps taken in organizing the company may have been irregular, or because the purpose of the incorporators may have been to establish a monopoly. Under these conditions *quo warranto* is the appropriate procedure to challenge the right of the corporation to exercise its franchises.¹⁵

12. PROMOTERS.

A promoter is one who brings together the persons who are to become interested in the enterprise, aids in promoting or procuring the subscriptions, and sets into motion the machinery which leads to the formation of the corporation itself. The promoter is the agent of the corporation and subject to the disabilities of an ordinary agent; his acts are scrutinized carefully and he is precluded from taking a secret advantage of the other stockholders. Accordingly it is held that a person starting a company and inducing others to subscribe to shares for the purpose of selling property to the company when organized, must faithfully disclose all facts relating to the property which would influence those who formed the company in deciding upon the judiciousness of the purchase. If the promoters are guilty of any misrepresentation of facts, or suppression of the truth in relation to the character and value of the property, or their personal interest in the proposed sale, the company will be entitled to set aside the transaction or recover the compensation for any loss which it has suffered.

In those cases where the scheme of organization gives the promoters the power of selecting the directors who are to represent the company

13—Cumberland Lumber Co. v. Clinton Hill Lumber & Mfg. Co., 64 N. J. Eq. 517 (1903).

14—Sherwin v. Sternberg, 77 N. J. L. 117 (1908).

15—Attorney General v. American Tobacco Co., 55 N. J. Eq. 352 (1897); affirmed 56 N. J. Eq. 847 (Court of Errors & Appeals, 1898).

in the proposed purchase, they are bound to select competent and trustworthy persons who will act honestly in the interest of the shareholders. A purchase made from the promoters under these circumstances will not bind the company unless it was a fair and honest bargain.

Promoters of a corporation are bound to the exercise of good faith to all the stockholders, to disclose all the facts relating to the property, and to select competent persons as directors, who will act honestly in the interest of the shareholders, and are precluded from taking a secret advantage of other shareholders.

This duty of disclosure of all material facts to a competent board of efficient directors is settled law in this state. It was so declared by Vice Chancellor Green in *Plaquemines Tropical Fruit Co. v. Buck*, 52 N. J. Eq. 219 (1893), and by Vice-Chancellor Pitney in *Woodbury Heights Land Co. v. Loudenslager*, 55 N. J. Eq. 78 (1896), on the authority of Vice-Chancellor Green and the English cases.

The duties of promoters in such case is based upon and arises out of the fact that they are acting as voluntary trustees, and hence are subject to all the rules of law applicable to the conduct of trustees.

"It was then the duty of the three gentlemen named—Stein, Beard and Untermeyer—as vendors of these properties to furnish the corporation with a competent and independent board of directors to negotiate this sale. Men who would act wholly in the interest of the future stockholders, and who would not be biased or influenced by the mere persuasions of the proposed vendors or friendship for either of them. It was their duty to disclose to that board of directors their position as vendors, and that Stein was a mere trustee for himself and Beard and Untermeyer. They should then have communicated to that board the actual cost of the several properties proposed to be sold to the corporation, and they should have invited an investigation as to their value and the cost of their reproduction. * * * Now, it seems to me that it is impossible to avoid the conclusion from those facts that the contract of sale procured to be adopted by this board of directors on the very day on which they were elected by the management of these three men whose names have just been mentioned and under the personal supervision of Mr. Beard and Mr. Untermeyer, and the formal contract entered into in pursuance of it, was a palpable fraud on the act of the legislature, and was entirely unwarranted thereby, and operated as a fraud, not only on the future stockholders of the company, as was distinctly held by the supreme court of the United States in the opinion so often referred to, but especially upon the future creditors of the company.

"Judge Brown (at p. 203) of 176 U. S. declares as follows: 'There is no doubt that if this were a suit by creditors to enforce payment of the unpaid portion of the stock subscription, the fact that the stock certificates declared that they were fully paid and unassessable would be no defence.' * * * But further, I am of the opinion that so far as the directors who passed the resolution in question for purchasing this

property are concerned, such of them as had already learned the terms on which the mortgage bonds were to be floated, had direct notice that the property was being overvalued. Since they knew that a bonus of sixty per cent in stock was being given as an inducement to persons to advance cash at par on bonds secured by property which, if worth anything like the sum at which they rated it, ought to be easily negotiated without a bonus, and they knew perfectly well that if the property was worth that amount of money, the company could not afford to give such a bonus for money."¹

Promoters are liable to the corporation for profits secretly made by them in its promotion, and such liability arises in cases where future allottees of stock are concerned.²

The principle running through all the authorities upon this branch of the law rests not upon the imposition of the penalty for concealment, but upon the single ground that one in a fiduciary capacity will not be permitted to retain a profit inequitably obtained. This is the rule and the exact measure of the decree, even in the case of a trustee who actually uses the company's money with which to make the proposed purchase. In the case of *Plaquemines Tropical Fruit Co. v. Buck*,³ the leading case on this subject, the facts were as follows: Buck agreed to purchase of one White a tract of land of about twenty-eight thousand acres, in the state of Louisiana, for \$25,000, to be paid, \$5,000 in cash, \$10,000 in three months, and \$10,000 in stock at par of a company to be formed for the development of the lands. Buck then issued a prospectus, over his own name, for the incorporation of such company and secured the promise of the necessary number of persons and means to comply with the contract. White then refused to carry out the agreement. Buck thereupon organized the company under the laws of New Jersey, and, although not an incorporator, was elected a director and president of the company. A resolution was passed, at the first meeting, to purchase the property for \$150,000, to be paid for \$120,000 in stock at par, \$10,000 in cash and the balance, \$20,000, in notes secured by a mortgage. Certificates for twelve thousand shares in blank were issued and delivered to Buck to effect the purchase. Buck commenced suit against White for the specific performance of the contract, which led to an agreement by which White was to convey four thousand more acres, reserving, for one year, the right to cut willows and to clear the land, and to receive \$27,000 instead of \$25,000. This agreement was carried out by White conveying to the attorney of Buck, who gave the notes secured

1—*Pitney, V. C.*, in *See v. Heppenheimer*, 69 N. J. Eq. 36 (1905). See *Bigelow v. Old Dominion Copper, etc., Co.*, 74 N. J. Eq. 457 (1908).

2—*Groel v. United Electric Company of New Jersey*, 70 N. J. Eq. 616 (1905); *Knoop v. Bohmrich*, 49 N. J. Eq. 82 (1891); *Plaquemines Tropical Fruit Co. v. Buck*, 52 N. J. Eq. 219 (1893); *Loudenslager v. Woodbury Heights Land Co.*, 58 N. J. Eq. 556 (Court of Errors & Appeals, 1899); modifying *Woodbury Heights Land Co. v. Loudenslager*, 55 N. J. Eq. 78 (1896).

3—52 N. J. Eq. 219 (1893).

on the property, and the attorney then conveyed to the company, subject to the encumbrances. Buck paid White \$5,000 in cash and seven hundred shares of stock. The attorney gave White three notes,—two for \$5,000 each and one for \$10,000. White gave up one of the \$5,000 notes to Buck, who turned it over to a party who had assisted him in making the bargain. The balance, twelve thousand shares of stock, Buck retained and distributed part to the other defendants. The evidence showed that Buck alone got up the company, secured the shareholders and selected the incorporators and officers; that he attended the meeting for organization and the first meeting of directors (his presence being necessary for a quorum) at which the purchase was authorized, and the weight of evidence was that he did not, in the hearing of all, disclose his interest in or relation to the property. A number of persons afterwards subscribed to the stock of the company and paid for the same, and money was borrowed on the credit of the company and the endorsement of some of the directors, some \$45,000 being thus put into the treasury by persons other than Buck, the most of which was entrusted to Buck, as manager, for disbursement. The affairs of the company proceeded under the management of Buck, until October, 1892, when a meeting of the other stockholders was held, of which Buck claims no proper notice was given, at which another board of directors was elected and Buck retired from the presidency. He, however, continued as manager until some further change being contemplated, he and his friends, claiming that the election of October, 1892, was irregular and void, issued a call for another meeting of the stockholders, to elect directors. Thereupon a bill was filed, partly for the purpose of preventing Buck and the other defendants from voting at such meeting upon the stock which they held, which was a part of the original twelve thousand shares issued as aforesaid.

On a motion to restrain Buck and the other defendants from parting with such stock and from voting thereon, Vice-Chancellor Green said:

"I take the law, applicable to this case, to be that 'no rights, legal or equitable, arise in favor of a corporation in respect of transactions, whether complete or inchoate, merely because entered into in contemplation of the creation of such corporation,' and that it was open to Dr. Buck to buy the property on his own account, for any price he could, with the intention or in the hope of selling it at a higher price to a company to be formed, and, dealing independently, to sell it for such higher price to such company so long as he obtained his higher price fairly. That would be clearly unobjectionable. But if he, at the time of his original agreement with White, entered into it on behalf of the future company, under such circumstances that the company when formed, could say that the purchase made by him was made for the company, or if, at the time the actual purchase was made from White, Dr. Buck was a trustee, officer or agent of the company, he cannot be permitted to make any profit from the sale to the company. Buck, as the promoter of the corporation, stood in a fiduciary relation to the

company as soon as it was organized. As such promoter, it was open to him to sell property which he owned, to the company, on making full and fair disclosure of his interest and position with respect to that property. Not only was such disclosure necessary, but it was incumbent on him, as sole promoter of the company, formed to purchase this specific property, controlling and moulding its organization, to furnish it with an executive or board of directors capable of forming competent and impartial judgment as to the wisdom of the purchase and the price to be paid; and if he, as such promoter, procured the company to be formed and to be managed in such a way as to transfer from the moneys of the company to himself a certain sum, without informing the company of that fact, or, what is the same thing, if he took without such disclosure, to his own use, stock of the company issued for the purchase of property, ostensibly to or for another, he cannot retain the same." It was held, that an injunction should issue to restrain defendants from parting with stock issued to them or voting thereon, until the final hearing of the cause.⁴

A written agreement was made between bankers, as promoters, and a number of manufacturers of paper goods, as vendors, for the organization of a corporation, to which the properties of the vendors should be conveyed, fixing the rights of all the parties. A secret agreement was subsequently made by the promoters with a part of the vendors, which gave the latter an advantage and profit over the other vendors. It was held that a bill for an accounting for such profits by one of the vendors, a party to the first agreement only, was not subject to demurrer for multifariousness for making all the vendors with whom the secret agreement was made, parties together with the corporation and the promoters. "On the question of multifariousness raised by a defendant other than the company," the court said, "the rule to be applied here would be that which was settled in *See v. Heppenheimer*, 55 N. J. Eq. 240 (Vice-Chancellor Pitney, 1897); affirmed on appeal, for reasons stated, 56 N. J. Eq., 453. In this case an issue of stocks and bonds of a company to the promoters was alleged to be a fraud on the company. The bill sought to hold the promoters liable and made parties all the holders of the bonds for the purpose of having them declared void. On the question of multifariousness raised by demurrer by two of the promoters, it was held (see p. 243) that it was not well founded, and that the demurring defendants were necessary parties in order that they might be bound by the litigation brought to determine (among other things) what was due upon the bonds. It is true, as argued by defendants' counsel, that this case involved to some extent the marshaling of the assets of an insolvent company by a receiver but this aspect, as the court held, justified making stockholders, as well as bondholders, parties to a single suit for the purpose of ascertaining the separate liability of each by reason of the issue to a pool of promoters of stocks

⁴—*Plaquemines Tropical Fruit Co. v. Buck*, 52 N. J. Eq. 219 (1893).

and bonds without consideration. The basis of the decision, as I read it, was that all the parties to the illegal issue of the stock and bonds, were proper parties to a single suit to determine the validity of the issue and the amount actually due on the bonds and stock."⁵

The obligation of a corporation for the contracts of a promoter must rest upon a ratification by the company.⁶

Where a purchase is made by several persons representing a voluntary association, for the common benefit of all the persons composing the association, and the purchase money is paid and possession of the land given, equity raises a promise by the vendor to make a title, either to the persons making the payment, or to the corporation if one be created. In such case the vendor, as to the title, becomes a trustee for the purchasers; and they being the mere agents of the voluntary association, the moment the association is incorporated it has a right to a conveyance from the vendor.⁷

Although it is the stated rule that neither a corporation nor a shareholder on its behalf, can complain of a fraudulent transaction to which all the stockholders assented with full knowledge of the facts,⁸ this principle is inapplicable unless the assent was that of the real parties in interest. Thus, where promoters of a consolidated corporation procured options for the purchase of the property to be consolidated for \$1,400,000, and representing that the cost of these assets was \$1,900,000, and organized a syndicate to raise such an amount under an agreement by which the syndicate managers were to receive syndicate shares, each exchangeable for \$10,000 of the mortgage bonds of the company, which was to mortgage its assets for \$2,500,000, and \$10,000 stock as a bonus, the total capital stock being \$5,000,000, it was held that the members of the syndicate in fact were the stockholders of the new company for whom the promoters acted as trustees, and the promoters were, therefore, accountable to them for the secret profit made by them in the purchase of the assets. The new corporation having refused to sue the promoters to recover such profit it was held that transferees of stock were entitled to sue in their capacity of stockholders on behalf of the corporation on grounds of public policy.⁹

5—*Shutts v. United Box, Board & Paper Co.*, 67 N. J. Eq. 225 (1904).

6—*Seacoast Railroad Co. v. Wood*, 65 N. J. Eq. 530 (1903).

7—*African M. E. Church v. Conover*, 27 N. J. Eq. 157 (1876).

8—*Arnold v. Searing*, 73 N. J. Eq. 262 (1907).

9—*Arnold v. Searing*, 73 N. J. Eq. 262 (1907).

II. CORPORATE EXISTENCE AND FRANCHISE.

13. NATURE OF THE FRANCHISE TO BE A CORPORATION; THE CHARTER OF A CORPORATION.

The charter of a corporation is the law which gives it existence as such. That is its general franchise, which can be repealed at the will of the legislature. A special franchise is the right, granted by the public, to use public property for a public use, but with private profit, such as the right to build and operate a railroad in the streets of a city. Such a franchise when acted upon, becomes property and cannot be repealed, unless power to do so is reserved in the grant, although it may be condemned upon making compensation. The general franchise of a corporation is its right to live and do business by the exercise of the corporate powers granted by the state. The general franchise of a street railroad company, for instance, is the special privilege conferred by the state upon a certain number of persons known as the incorporators to become a street railroad corporation and to construct and operate a street railroad upon certain conditions. Such a franchise, however, gives the corporation no right to do anything in the public highways without special authority from the state, or some municipal officer or body acting under its authority. When the right of way over a public street is granted to such a corporation, with leave to construct and operate a street railroad thereon, the privilege is known as a special franchise, or the right to do something in the public highway, which, except for the grant, would be a trespass.¹

The right to be a corporation is frequently called a franchise, as it is in one sense, but not in the sense that the grant of a right to build a railroad in a public street is a franchise, and it is unfortunate that the same word is used with widely different meanings, for it leads to confusion unless qualified by an appropriate adjective, such as "general" or "special." The right to be a corporation, or the corporate right of life, is inseparable from the corporation itself. It is a part of it and cannot be sold or assigned. That franchise is general and dies with the corporation, for it cannot survive dissolution or repeal. On the other hand, grants to do something in the public streets or special franchises are not a part of the corporation. They can be made to an individual with the same legal force or effect as to a corporation. Unless there is some legislative restriction they can be mortgaged and sold. They are no part of corporate life, if owned, by a corporation, any more than they are a part of individual life if owned by a human being.²

1—*People ex rel. Metr. St. Ry. Co. v. State Board of Tax Com'rs*, 174 N. Y. 417, 435 (1903).

2—*Lord v. Equitable Life Assur. Society*, 194 N. Y. 212 (1909).

Since the constitutional amendments of 1875 forbidding the legislature thereafter to pass any special act conferring corporate powers and requiring that general laws be passed under which corporations may be organized and corporate powers of every nature obtained, the granting of corporate powers is now to be sought in the General Laws thus enacted and in the articles of association filed thereunder, which are in effect the "charter" of the company.³

The certificate of incorporation of a company formed under a general act to the extent of the lawful provisions therein possesses the quality of a charter granted by the legislature.⁴

As applied to corporations, every grant of franchises is a charter. It may be a grant of the mere franchise of being a corporation, or a grant of powers to a corporation already in existence. In either case, the grant is the company's charter to exercise the rights and privileges, and enjoy the immunities granted.⁵

Duties required by the act of incorporation are in the nature of conditions annexed to the grant of the franchise. Such conditions may be precedent or subsequent, and like other conditions may be waived or released by the power granting, or a new grant may be made free from any limitation or condition by the same power.⁶

Since the Dartmouth College Case, in the Supreme Court of the United States, the doctrine has been considered firmly established, and been confirmed by repeated decisions, both in that court and the state courts, that a charter, granted by the legislature to a corporation, is a contract between the state and the corporators, and that the state can pass no act to take away or impair any of the franchises or privileges granted by it. The company, or artificial person thus created, and its property, is subject to all general laws and police regulations made by the legislature after such grant, in the same manner as natural persons and their property are; provided they are not such as to take away or impair any of the franchises plainly granted by the charter. This doctrine, however, does not prevent the legislature from conferring new privileges upon any corporation, to be accepted at its own election.⁷

A company incorporated under a general statute is in the position of a corporation under a charter containing special and limited powers. Persons dealing with such companies are affected with notice of all

3—State v. Atlantic City & S. R. Co., 77 N. J. L. 465 (Court of Errors & Appeals, 1909).

4—Brown, Receiver v. Morton, 71 N. J. L. 26 (1904).

5—State, Morris & Essex R. R. Co. v. Comm'r of Railroad Taxation, 37 N. J. L. 228 (1874).

6—State v. Godwinsville & Paterson Road Co., 44 N. J. L. 496, 499 (1882).

7—Zabriskie v. Hackensack & N. Y. Railroad Co., 18 N. J. Eq. 178 (1867); Mills v. Central R. R. Co. of N. J., 41 N. J. Eq. 1 (1886); Einstein v. Raritan Woolen Mills, 74 N. J. Eq. 624 (1908).

that is contained in the statute and the articles of association; but with regard to all that the directors do with reference to what is called "the indoor management of their concern," that is a thing known to them, and to them only, and persons dealing externally with those managing the affairs of the company, in a manner which appears to be perfectly consonant with the articles of association, are not to be affected by any irregularities which take place in the internal management of the company. They are entitled to presume that that of which only they can have knowledge, namely, the external acts, is rightly done, when those external acts purport to be performed in the mode in which they ought to be performed.⁸

14. EVIDENCE OF CORPORATE EXISTENCE.

In all proceedings by and against a corporation its corporate existence is presumed and can be put in issue only by a plea denying such existence. (See supplement of April 8, 1903, to the Corporation act, in Part II of this book.)

A corporation being the plaintiff in the suit need not prove its corporate existence under a plea of the general issue, or other plea to the merits.¹

In an action of ejectment, brought by the assignee of a mortgage against a mortgagor, upon a mortgage given to a corporation, it is not necessary to produce the charter of incorporation. The admission by the defendant himself in the deed of mortgage, is sufficient proof when uncontradicted, of the existence of the corporation.²

The Corporation act provides (§ 9) that the certificate of incorporation or a copy thereof duly certified by the secretary of state, shall be evidence in all courts and places.

15. COMMENCEMENT OF CORPORATE EXISTENCE.

The Corporation act provides (§ 10) that upon making the certificate of incorporation and causing the same to be recorded and filed as aforesaid, the persons so associating, their successors and assigns, shall, from the date of such filing, be and constitute a body corporate by the name set forth in said certificate, subject to dissolution as in this act elsewhere provided.

See also, as to corporations formed under other general acts, Part II of this book.

16. DURATION OF CORPORATE EXISTENCE.

Unless limited in its charter or certificate of incorporation the existence of a corporation is perpetual.

8—Hackensack Water Co. v. DeKay, 36 N. J. Eq. 548 (Court of Errors & Appeals, 1883).

1—Star Brick Co. v. Ridsdale et al., 36 N. J. L. 229 (1873).

2—Den v. Van Houten, 10 N. J. L. 270 (1829).

17. EXTENSION AND RENEWAL OF CORPORATE EXISTENCE.

As to the manner of extending the corporate existence under section 27 of the Corporation act, see section 19 below.

The statute (P. L. 1897, p. 11) provides that any corporation, created by special charter, or under a general law, for any objects which are allowed by this act, may extend its corporate existence in the manner prescribed in the twenty-seventh section of this act; provided, that if such corporation possesses franchises, powers, privileges, immunities or advantages which could not be obtained under this act, such extension shall not continue, renew or extend such franchises, powers, privileges, immunities or advantages, but the filing of the certificate of extension shall operate as a waiver and abandonment of such franchises, powers, privileges and advantages.

There is another act (P. L. 1903, p. 391) providing that the corporate existence of any corporation (except a savings bank, a building and loan association, an insurance company, a surety company, a railroad company, a street railroad company, a telegraph company, a telephone company, a gas company, an electric light company, a turnpike company, a plankroad company, or any company which possesses the right of taking and condemning lands in this state) may be extended, even though its charter may have expired by limitation of time, within four years next preceding the date when the certificate of extension shall have been filed.

By the extension of the existence of a corporation the legal identity remains unchanged. It is not a new life that is received, but simply the power to continue the old life beyond the period first fixed for its expiration.

"It is entirely settled that these acts of succession do not have the effect of cancelling continuing obligations of the corporation, nor can they be pleaded in repudiation of any outstanding liability whatsoever."¹

18. RESERVED POWER OF LEGISLATURE TO ALTER, AMEND OR REPEAL CHARTERS.

The Corporation act provides (§ 4) that the charter of every corporation, or any supplement thereto or amendment thereof, shall be subject to alteration, suspension and repeal at the discretion of the legislature, and the legislature may at pleasure dissolve any corporation.

The language of this provision has remained unchanged since its original enactment in 1846 (Act of 1846, § 6).

In the revision of 1896 (§ 5) there was included in the act for the first time that this act may be amended or repealed, at the pleasure of the legislature, and every corporation created under this act shall be bound by such amendment; but such amendment or repeal shall not

¹—First Presbyterian Church v. State Bank, 57 N. J. L. 27 (1894), affirmed 58 N. J. L. 406 (Court of Errors & Appeals, 1895).

take away or impair any remedy against any such corporation or its officers for any liability which shall have been previously incurred; this act and all amendments thereof shall be a part of the charter of every corporation heretofore or hereafter formed hereunder, except so far as the same are inapplicable and inappropriate to the objects of such corporation.

Construing these statutory provisions, Mr. Justice Van Syckle, in *Berger v. United States Steel Corporation*¹ said:

"It must be conceded that it is firmly settled in our jurisprudence that the right reserved in this sixth section to amend, alter or repeal charters extends only to the modification or destruction of rights as between the state and the corporation, but that the rights of the stockholders inter sese can in no respect be impaired, except in so far as impairment may result from an alteration required by the public interest. *Kean v. Johnson*, 1 Stock. 401; *Zabriskie v. Hackensack*, 3 C. E. Gr. 178, and *Mills v. Central Railroad Co.*, 14 Stew. Eq. 1, are cases under the act of 1846, and the *Newark Library Case*, 35 Vr. 217, 265, dealt with the right of amendment and repeal under the act of 1846.

"The act of 1896, under which the appellant is incorporated, by its fourth section, re-enacted the sixth section of the act of 1846, and also provides, in its fifth section, as follows (quoting the section given above).

"This section was first enacted in the revision of the Corporation act of 1896, and it must have been designed to amplify and enlarge the power of the legislature over corporations organized under it. Under the provision contained in the sixth section of the act of 1846, retained in the revision of 1896, it had been repeatedly held that the power was fully reserved to alter or repeal charters for the benefit of the public. The language of the fifth section of the act of 1896 is very broad: "This act and all amendments thereof shall be a part of the charter of every corporation heretofore or hereafter formed under it." It is difficult to perceive how any substantial force can be accorded to it, unless some amendment may be made which may affect the rights of stockholders inter sese to some extent. In *Andrews v. Gas Meter Co.*, L. R. 1 Ch. 361 (1897), the defendant company was formed and registered as a limited company under the English Companies' act of 1856, but in October, 1862, it was registered under the Companies' act of 1862. On appeal, the English court held that the case was to be determined by the act of 1862, and that a limited company, having no authority, under its memorandum or articles, to create any preference between different classes of shares, may, by special resolution passed under powers conferred by the Companies' act of 1862, sections 50 and 51, alter its articles so as to authorize directors to issue preference shares by way of increase of capital. * * * It is unnecessary, however, to determine, in this case, what the true limitation upon the legislative power is; where the boundary line is which cannot be overstepped. Such a dec-

1—63 N. J. Eq. 809 (Court of Errors & Appeals, 1902).

laration in this case would be *obiter* and unwise. The law upon this subject, which is of great moment, is, as yet, in a formative state; a general rule upon a subject of so wide a range can be implanted in our jurisprudence only by gradual development, as questions arise for adjudication. Vice in a legislative act cannot safely be predicated upon the mere fact that it may not be unreasonable to apprehend that some depreciation in the value of shares may flow from it. The legislature may impose additional burdens; it may withdraw the right to engage in some remunerative branch of business, and may repeal the entire charter. Undoubtedly there may be changes so radical that underlying and fundamental principles will not permit the legislature to reserve to itself a right to make them. It is not intended to express an opinion as to the effect of the fifth section of the act of 1896 upon this question of vested rights, and it will be dealt with as if there was no authority for the act of 1902, other than that contained in section 4 of the act of 1896, and the case of *Kean v. Johnson*, *supra*, will be accepted as a proper exposition of the law.”²

For many years after the passage of the act of 1846 it was uniformly held by the courts of this state that the sixth section of the act of 1846 was to be literally read into every charter thereafter granted by the legislature, thereby rendering every such charter subject to repeal or alteration at the legislative discretion. Such was the judgment of the Court of Errors and Appeals in *Morris and Essex Railroad Co. v. Commissioners of Taxation*, 38 N. J. L. 472, decided in 1875. That case was removed to the Supreme Court of the United States and the decision of the New Jersey court was reversed. (*New Jersey v. Yard*, 95 U. S. 104.)

The Federal court, in reversing it, declared that a legislature could not bind its successors; that, notwithstanding the act of 1846, it was still competent for any legislature to make an irrepealable contract if it chose, and that it was therefore a question in every case of a contract made by the legislature, whether that body intended that the right to change or repeal it should inhere in it, or whether, like other contracts, it was perfect, and without the power of the legislature to impair its obligations.

The court held the contract under consideration in that case to be irrepealable because it said it could not be believed that it was the intent of either party to it that one should be held forever, and the other merely at will, and it refused to read the act of 1846 into the contract because the contract was inconsistent with it.

“The rule thus so explicitly laid down by the Federal court has since been accepted as the law of this court. (*State Board v. Morris and Essex Railroad Co.*, 49 N. J. L. 193.) Unless, therefore, an intention can fairly be drawn from the terms of this contract, as agreed upon by the parties, to reserve to the state the right to repeal the contract at

²—*Berger v. U. S. Steel Corporation*, 63 N. J. Eq. 809 (Court of Errors & Appeals, 1902).

will without the consent of the company, there can be no departure from it." ³

The principle of the decision in *New Jersey v. Yard*, 95 U. S. 104, 113, is that the legislature may grant to a corporation two classes of rights and franchises, those over which it retains control to modify or withdraw by alteration or repeal and those which are embodied in a contract, and hence incapable of alteration or repeal and that under such circumstances the legislative control by alteration or repeal, is exercisable only upon the charter rights and privileges over which such power is retained. ⁴

The charter of a private corporation, enacted before the adoption of the constitutional amendments of 1875 and containing an exemption of the property of the corporation from taxation, might, if granted for a valid consideration moving to the state, and if accepted and acted upon by the recipient according to its terms, become a contract binding upon the state, and, by force of the Federal constitution, irrevocable.

Until such charter was accepted and the consideration actually paid or delivered according to its terms, it remained subject to repeal, either by act of the legislature or by act of the people in amending the constitution.

The constitutional amendments of 1875, providing (inter alia) that "property shall be assessed for taxes under general laws and by uniform rules, according to its true value," had the effect of abrogating any special law for the assessment of taxes and any special immunity from taxation theretofore granted and not already accepted in such manner as to constitute a contract.

"By the Federal constitution (article 1, section 10) it is declared that no state shall pass any law impairing the obligation of contracts. That an irrevocable contract, within the meaning of this clause, may be embodied in the charter of a private corporation enacted by the legislature having power to grant the same is the necessary result of the doctrine laid down in the great *Dartmouth College Case*, 4 Wheat, 518. That such a charter may even contain a contract exempting the property of the corporation from taxation, and if so granted for a valid consideration moving to the state, and accepted and acted on by the recipient, may become binding on the state according to its terms, is established by a line of decisions in the United States Supreme Court, and is, of course, recognized by this court." ⁵

3—*Hancock, Comptroller, v. Singer Mfg. Co.*, 62 N. J. L. 289 (Court of Errors & Appeals, 1898). See, however, *Shiloh Turnpike Co. v. Bates*, 76 Atl. 448 (1910).

4—*State Board of Assessors v. Morris & Essex R. R. Co.*, 49 N. J. L. 193 (Court of Errors & Appeals, 1886).

5—*Chancellor Pitney in Cooper Hospital v. Camden*, 68 N. J. L. 691 (Court of Errors & Appeals, 1903); citing *Gordon v. Appeal Tax Court*, 3 How. 13; *Piqua Branch of State Bank of Ohio v. Knoop*, 16 How. 369; *Dodge v. Woolsey*, 18 How. 331; *Home of the Friendless v. Rouse*, 8 Wall. 430; *Wilmington Railroad Co. v. Reid*, 13 How. 364; *New Jersey v. Yard*,

The charter of a corporation is a contract with the state, and, if ir-repealable, is protected by the same constitutional provisions which render invariable contracts between individuals—that the legislature shall not pass any law impairing the obligation of contracts or depriving the party of any remedy for enforcing a contract which existed when the contract was made. The rules for the construction of these constitutional prohibitions, as applicable to contracts between individuals, apply as well to contracts by the state with corporations created under charters which are irrepealable.⁶

In *Lehigh Valley R. R. Co. v. McFarlan*,⁷ it was held, that the charter of the company there in question was irrepealable, and created a contract which is incapable of alteration or repeal by the legislature, except by mutual consent, and is, therefore, unaffected by the constitution of 1844, which forbids the taking of property by private corporations for public use, without compensation first made. The company's charter, and the powers and privileges therein granted, continue, notwithstanding the change of policy adopted by the constitution of 1844, and possess equal vitality with respect to acts done by the company under it, after the constitution of 1844 became the fundamental law, as if done before the adoption of that instrument.

"A contract that disables the state from exercising the sovereign prerogative of taxation, with respect to the property of a given corporation, is in derogation of common right, and, so far as it goes, is subversive of the power of government itself. Every reasonable intendment is against the existence of such a contract. He who comes into court asserting its existence must be prepared to show that, in fact, it was made as alleged, and that its terms are such as to reasonably admit of no other interpretation than that claimed."⁸

When the right to alter or amend a charter, whenever the public good may require, is reserved, the legislature is the proper tribunal to determine when the right shall be exercised.⁹

Under the reserved power to amend, alter, or repeal the laws under which private corporations are formed, the state cannot exercise a control over property of a corporation, except such as may be exercised through control over its franchise, and over like property of

95 U. S. 104; *Farrington v. Tennessee*, 95 U. S. 679; *State Board of Assessors v. Morris & Essex Railroad Co.*, 49 N. J. L. 193; *Mount Pleasant Cemetery Co. v. Newark*, 52 N. J. L. 539; *Singer Manufacturing Co. v. Heppenheimer*, 68 N. J. L. 633; *Hancock v. Singer Manufacturing Co.*, 62 N. J. L. 289.

6—*United Companies v. Weldon*, 47 N. J. L. 59 (1885).

7—31 N. J. Eq. 706 (Court of Errors & Appeals, 1879).

8—*Cooper Hospital v. Camden*, 68 N. J. L. 691 (Court of Errors & Appeals, 1903).

9—*State, Morris and Essex Railroad Co., Pros., v. Miller, Collector*, 31 N. J. L. 521 (Court of Errors & Appeals, 1864). See also *The State v. The Mayor and Common Council of Jersey City*, 31 N. J. L. 575 (Court of Errors & Appeals, 1865).

natural persons engaged in similar business. It cannot divest property or rights which have become vested.¹⁰

The power of alteration, amendment or repeal which the state reserved in its grant of permissive incorporation, has no effect upon contract relations arising from membership.¹¹

"After the effect of the rule established in the Dartmouth College case began to be felt in the states, it was found that by the numerous acts of incorporation, freely and perhaps necessarily granted, great inconveniences resulted, and that provisions incautiously inserted, too much restricted the power of future legislatures; and that the laws, which experience showed were necessary to govern corporations in the exercise of their powers, could not be passed. And the legislatures of many states, by degrees and successively, adopted the practice of inserting in acts granting franchises, that they might alter, modify or repeal the act; and also, by general law, provided that all acts of incorporation thereafter passed should be subject to such alteration and repeal.

"The provision is contained in the general act of this state, passed in 1846, that such charters should be subject to alteration, suspension and repeal in the discretion of the legislature. This and all similar special and general provisions were intended for the purpose specified; to give to the legislature the clear right, at their pleasure, to alter or repeal the acts of incorporation. The state, without this, could have done it with the assent of the corporators. They could give them property; they could add to their powers or privileges. But they could not take away any power, privilege, or franchise, conferred by the act, nor compel them to exercise any new power or franchise conferred.

* * *

"The object and purpose of these provisions are so plain, and so plainly expressed in the words, that it seems strange that any doubt could be raised concerning it. It was a reservation to the state, for the benefit of the public, to be exercised by the state only. The state was making what had been decided to be a contract, and it reserved the power of change, by altering, modifying, or repealing the contract. Neither the words nor the circumstances, nor apparent objects for which this provision was made, can, by any fair construction, extend it to giving a power to one part of the corporators as against the other, which they did not have before. It was to avoid the rule in the Dartmouth College case, not that in *Natusch v. Irving*, that the change was made. The words limit the power to that object. * * *

10—*Railroad Tax Cases*, 13 Fed. Rep. 723.

11—*Rahway v. Munday*, 44 N. J. L. 395 (Courts of Errors & Appeals, 1882); *In re Newark Library Association*, 64 N. J. L. 265 (Court of Errors & Appeals, 1900); *Johnston v. Mutual Guarantee Building & Loan Association*, 66 N. J. L. 683 (Court of Errors & Appeals, 1901); *Schwarzwaelder v. German Mutual Fire Insurance Co.*, 59 N. J. Eq. 589 (Court of Errors & Appeals, 1899); *Einstein v. Raritan Woolen Mills*, 74 N. J. Eq. 624 (1908).

"Again, the power of the legislature has its limits. It can repeal or suspend the charter; it can alter or modify it; it can take away the charter; but it cannot impose a new one, and oblige the stockholders to accept it. It can alter or modify the old one; but power to alter or modify anything can never be held to imply a power to substitute a thing entirely different. It is not the meaning of the words in their usually received sense. Power to alter a mansion house would never be construed to mean a power to tear down all but the back kitchen and front piazza, and build one three times as large in its place. In anything altered, something must be preserved to keep up its identity; and a matter of the same kind, wholly or chiefly new, substituted for another, is not an alteration; it is a change."¹²

A statute which, on its enactment, becomes perhaps only conditionally the law of the corporation, the condition being the assent of all the stockholders, becomes on fulfillment of that condition the absolute law of the corporation, and the assent once given is irrevocable.¹³

A corporation having an irrevocable charter which provides for a special mode of taxation, and that "no other or further tax or imposition shall be levied or imposed upon the said company" may consent to other taxation, or a different mode of assessment from that specified in its charter, by the acceptance of subsequent legislative acts, without impairing the exemption from general taxation contained in its charter. In such event, the new taxation becomes part of the original contract, and modifies its terms to that extent, leaving the restriction therein on further taxation in full force.¹⁴

19. AMENDMENT, CHANGE OR ALTERATION OF CHARTER OR CERTIFICATE OF INCORPORATION.

A supplement to the Corporation act (P. L. 1898, p. 407) provides that it shall be lawful for the incorporators of any corporation, before the payment of any part of its capital, to record with the clerk of the county in which its original certificate of incorporation was recorded and file with the secretary of state, an amended certificate duly signed by the incorporators named in the original certificate of incorporation, and duly acknowledged or proved as required for certificates of incorporation under the Corporation act "modifying, changing or altering its original certificate of incorporation, in whole or in part, which amended certificate shall take the place of the original certificate of incorporation, and shall be deemed to have been filed and recorded on the date of the filing and recording of the original certificate; provided, however, that nothing herein shall permit the insertion of any

¹²—*Zabriskie v. Hackensack & N. Y. Railroad Co.*, 18 N. J. Eq. 178 (1867).

¹³—*In re Newark Library Association*, 64 N. J. L. 265 (Court of Errors & Appeals, 1900).

¹⁴—*State, United R. R. & Canal Co. v. Comm'r of Railroad Taxation*, 37 N. J. L. 240 (1874).

matter not in conformity with the act to which this is a supplement; and provided, however, that this act shall not in any manner affect any proceedings pending in any court."

The Corporation act (§ 27, as amended by P. L. 1908, p. 127) provides that every corporation organized under the act may change the nature of its business, change its name, increase its capital stock, decrease its capital stock, change the par value of the shares of its capital stock, change the location of its principal office in this state, extend its corporate existence, change its common stock into one or more classes of preferred stock, create one or more classes of preferred stock, and make such other amendment, change or alteration as may be desired, in manner following: The board of directors shall pass a resolution declaring that such change or alteration is advisable and calling a meeting of the stockholders to take action thereon; the meeting shall be held upon such notice as the by-laws provide, and in the absence of such provision, upon a ten days' notice, given personally or by mail; if two-thirds in interest of each class of the stockholders having voting powers shall vote in favor of such amendment, change or alteration, a certificate thereof shall be signed by the president and secretary under the corporate seal, acknowledged or proved as in the case of deeds of real estate, and such certificate, together with the written assent, in person or by proxy, of two-thirds in interest of each class of such stockholders, shall be filed in the office of the secretary of state, and upon the filing of the same, the certificate of incorporation shall be deemed to be amended accordingly; provided, that such certificate of amendment, change or alteration shall contain only such provision as it would be lawful and proper to insert in an original certificate of incorporation made at the time of making such amendment and the certificate of the secretary of state that such certificate and assent have been filed in his office shall be taken and accepted as evidence of such change or alteration in all courts and places.

As to corporations not organized under the Corporation act the act provides (§ 28, as amended by P. L. 1908, p. 127) that any corporation of this state, whether organized under a special act of incorporation or under general laws, excepting railroad and canal corporations, and other corporations possessing the right of taking and condemning lands, may increase or decrease its capital stock, change its name, the par value of the shares of its capital stock, or the location of its principal office in or out of this state, change its common stock into one or more classes of preferred stock, create one or more classes of preferred stock, and fix any method of altering its by-laws permitted by the act to which this is a supplement, in the manner prescribed in the foregoing section, and any corporation may in the same manner relinquish one or more branches of its business, or extend its business to such branches as might have been inserted in its original certificate of incorporation.

Another act (P. L. 1899, p. 174; see Part II below) authorizes amendments to cure formal defects.

The certificate of incorporation of a company forms a contract between the several stockholders, which, except by unanimous consent, cannot be affected by any change in it made by virtue of any subsequent act of the legislature, but can only be effectually changed by virtue of some act of the legislature then in force, which can be read into the contract.¹

"The general principle here asserted has frequently received the sanction of the courts, both of England and this country. It is the same, whether applied in the case of private associations or incorporations. 'It is not, I apprehend,' says Lord Eldon, 'competent to any number of persons in a partnership (unless they show a contract rendering it competent to them), formed for specified purposes, if they propose to form a partnership for different purposes, to effect that formation by calling upon some of the partners to receive the subscribed capital and interest and quit the concern.' 'And again,' he says in the same case, 'those who seek to embark a partner in a business not originally part of the partnership concern, must make out clearly that he did expressly or tacitly acquiesce.' *Natusch v. Irving*, Appendix to *Gow on Part.* 576, Am. Ed. 1830, and see also the opinion of Kent, C., in *Livingston v. Lynch*, 4 Johns. Ch. R. 573. So in incorporations. Nothing is more certainly settled than that any fundamental alteration of the charter, or material deviation from or extension of a road, in the case of road companies, interferes with the rights of the corporators, and that no majority, however large, can compel any individual stockholders to submit."²

It is well settled that a court of equity will interfere on behalf of a single stockholder, if he can show that the corporation is employing its statutory powers, funds, etc., for the accomplishment of purposes not within the scope of its institution, and an injunction in such cases will be granted.³

"It is also settled, upon the principles of the common law, in this state, and most of the states of the Union, that when a number of persons associate themselves as partners, for a business and time specified in the agreement between them, or become members of a corporation for definite purposes and objects specified in their charter, which in such case is their contract, and for a time settled by it, that the objects and business of the partnership or corporation cannot be changed, or abandoned, or sold out, within the time specified, without the consent of all the partners or corporators; one partner or corporator, however small his interest, can prevent it. And this is so, although by law a majority in either case can control or manage the business against the will and interest of the minority, so long as it is within the scope of the partnership or charter.

1—*Meredith v. Zinc & Iron Co.*, 55 N. J. Eq. 211 (1897); affirmed 56 N. J. Eq. 454.

2—*Kean v. Johnston*, 9 N. J. Eq. 401 (1853).

3—*Gifford v. N. J. Railroad Co.*, 10 N. J. Eq. 171 (1854).

"This rule is founded on principle, the great principle of protecting every man and his property by contracts entered into, a guiding principle in all right legislation and incorporated into the constitution of the United States, and of almost every state in the Union. And the rule is not changed because the new business or enterprise proposed is allowed by law, or has been made lawful since the association was formed."⁴

As between the incorporators of any company, the corporate objects expressed in its articles of association, cannot be changed without unanimous consent, unless changed by virtue of some act of legislation which may be read into the contract. And action on the part of the corporation to change the nature of its business, is to be exercised, if at all, by direct proceedings taken pursuant to the statute authorizing it. The acts authorizing consolidation neither permit nor contemplate that a change of the objects of incorporation is to be accomplished by means of a consolidation agreement.⁵

20. TERMINATION OF CORPORATE EXISTENCE.

The existence of a corporation may be terminated in the following ways:

1. By failure to perform statutory conditions. Where a statute, creating a corporation declares, that unless the corporation performs certain acts within a specified time after its organization, its corporate existence and powers shall cease, or its powers and franchises shall terminate, it has been held, that the statute executes itself, and that if the designated acts are not done within the time limited, the corporation ceases ipso facto to exist, and the fact that it has, by its laches, lost corporate life and power may be alleged and proved in a collateral proceeding.¹

2. By expiration of time limited in the charter.

3. By forfeiture.

4. By surrender or voluntary dissolution.

4—*Zabriskie v. Hackensack & N. Y. Railroad Co.*, 18 N. J. Eq. 178 (1867).

5—*Colgate v. United States Leather Co.*, 72 Atl. 126 (Court of Errors & Appeals, 1909). See also as to increase of capital stock and creation of preferred stock, *Einstein v. Raritan Woolen Mills*, 74 N. J. Eq. 624 (1908). See also *Pronick v. Spirits Distributing Co.*, 58 N. J. Eq. 97 (1899); *Smith v. Eastwood Wire Mfg. Co.*, 58 N. J. Eq. 331 (1899). And see also sections 50, 51, 52 and 53 (pp. 114-125 below).

1—*Van Fleet, V. C.*, in *Ellizabethtown Gas Light Co. v. Green*, 46 N. J. Eq. 118 (1889).

III. CORPORATE NAME, SEAL, DOMICILE, BY-LAWS AND RECORDS.

21. THE NAME OF A CORPORATION.

The name must be set forth in the certificate of incorporation, and the Corporation act provides (§ 8) that no name shall be assumed already in use by another existing corporation of this state, or so nearly similar thereto as to lead to uncertainty or confusion.

It is provided by statute (P. L. 1897, p. 274) that no corporation shall hereafter be organized under the provisions of "An act concerning corporations" (revision of 1896), approved April twenty-first, one thousand eight hundred and ninety-six, or any amendment thereof or supplement thereto, with the words "insurance" or "safe deposit" or "trust company" or "bank" as a part of its name, and no certificate of incorporation shall be hereafter received for filing or record or be filed or recorded in any office in this state for the purpose of effectuating its incorporation, and that no corporation heretofore organized or doing business under the aforesaid act shall, by change or amendment of its name, use the words "insurance" or "safe deposit" or "trust company" or "bank" or any of them as part of its name, and no certificate of change or amendment shall be hereafter received for filing or record or be filed or recorded in any office in this state for the purpose of effectuating such change.

The corporate name may be changed by amendment of the certificate of incorporation (see § 19 above).

A corporation may acquire a name by usage, as by retaining its original name after a change thereof was authorized by an act of the legislature, and an adjudication in bankruptcy made against it by the name so acquired is valid.¹

The misnomer of a corporation in a grant or obligation, does not destroy or defeat the grant or obligation, nor prevent a recovery upon it in the true name, provided the corporation designed and intended by the parties to the instrument, be shown by proper and apt averments and proof.²

"But then, it appears to me, to be essential in all these cases of variance, that it should be averred in the pleadings that the person or corporation described in the grant, is the same with that named in the writ."³

1—Alexander v. Berney, 28 N. J. Eq. 90 (1877).

2—Inhabitants of Woolwich v. Forrest, 2 N. J. L. 107 (1806); Inhabitants v. String, 10 N. J. L. 323 (1829); Hoboken Building Association v. Martin, 13 N. J. Eq. 427 (1861).

3—Kirkpatrick, C. J., in *Inhabitants of Woolwich v. Forrest*, 2 N. J. L. 107 (1806).

But a deed made by mistake to a party well named, will not be construed in a court of law to enure to the party intended, even if such intention may be fairly inferred from the face of the deed.⁴

The giving by the legislature to an association a corporate existence by a particular name is a grant of the exclusive right to use that name and to be in fact and in law the only association of that character and that name within its territorial limits.⁵

But although a corporation may adopt any corporate name which is not in conflict with the corporation act, such adoption gives it no greater right thereto to the injury of another than if an individual should so act.⁶

There can be no doubt of the power of a court of equity to restrain the improper use of a corporate name. The principles involved, in many respects, are analogous to those arising in the protection of trademarks. The essential inquiry in all cases is, is the new name as used calculated to deceive or mislead.⁷

"Anyone has a right to use his own name in business, but he may be restrained from its use if he uses it in such a way as to appropriate the good will of a business already established by others of that name. (This is the important thing.) Nor can he by the use of his own name appropriate the reputation of another by fraud, either constructive or actual." * * * "These and many other cases hold that there is no sanctity in the name being used by a corporation either directly created by special charter or organized under general laws. If organized under a special charter, it is usually chosen by the petitioner therefor. If organized under a general law, it is chosen by the organizer. In either case, they adopt it at their peril." ⁸

While a personal name may not constitute a technical trademark, yet where an article has come to be known by that personal name, one may not use that name even though it be his own, to palm off his goods as the goods of another, who has first adopted it and by which appellation the goods have come to be known, when the use of his own name for such purpose works a fraud. If he uses his own name, it must be so used as not to deprive others of their rights or to deceive the public, and the name must be accompanied with such indications that the

4—*Den v. Hay*, 21 N. J. L. 174 (1847).

5—*State Council v. National Council*, 71 N. J. Eq. 433 (1906).

6—*Bear Lithia Springs Co. v. Great Bear Spring Co.*, 71 N. J. Eq. 595 (1906); *affd.* 72 N. J. Eq. 871 (1907).

7—*O'Grady v. McDonald*, 72 N. J. Eq. 805 (1907); *International Silver Co. v. Rogers Corporation*, 67 N. J. Eq. 646 (Court of Errors & Appeals, 1904); *Eureka Fire Hose Co. v. Eureka Rubber Mfg. Co.*, 69 N. J. Eq. 159 (1907); 72 N. J. Eq. 555 (Court of Errors & Appeals, 1907); *Glucose Sugar Refining Co. v. American Glucose Sugar Refining Co.*, 22 N. J. L. J. 137 (1899); *Stirling Silk Mfg. Co. v. Stirling Silk Co.*, 59 N. J. Eq. 394 (1900); *L. Martin Co. v. L. Martin Wilckes Co.*, 71 Atl. 409 (1909).

8—*Pitney, V. C.*, in *Edison Storage Battery Co. v. Edison Automobile Co.*, 67 N. J. Eq. 44 (1904).

thing manufactured is the work of the one making it as would unmistakably inform the public of the fact.⁹

"The present case presents the still narrower question of the right to adopt and use a corporate name calculated to deceive, with an intent to profit by the trade reputation of others.

"The defendant corporation did not adopt its name in order to secure the good will of a business which had been built up by William H. Rogers. The facts stated in the vice-chancellor's opinion, and sustained by the evidence, demonstrate, in our judgment, that William H. Rogers had engaged in the business of selling silver-plated ware, as far as he can be said to have engaged in that business at all, in view of his other vocations, solely with the object of profiting by the similarity of his name to the name of Rogers, so well known in the trade, to the good will of which the plaintiff had succeeded. William H. Rogers, under the facts of this case, had not acquired a trade reputation for silver-plated ware. He had had no experience in the actual manufacture; his name was not a guarantee of the excellence of his wares; his experience was little more than that of a mere packer of goods made by others; most of the goods nominally made for him he had never seen or handled; he had had no more to do with the actual sales during the more active part of the business—that during which the Benedicts handled the goods in his name—than to receive a small profit over the manufacturer's price, a profit which was manifestly paid to him by the Benedicts in order that they might use the name of Rogers, and thereby profit by the trade reputation of the complainant. The name of the defendant could not, therefore, have been selected with a view to retain for the corporation the good will of William H. Rogers. It was selected, in our judgment, solely with the intention of deriving a profit by means of the Rogers name, from the reputation built up by many years of business activity by the predecessors of the complainant.

"Such a case is not like that of a natural person using his own name. It is more nearly like the case of a natural person who voluntarily selects a name for his business which may enable him to profit by another's trade reputation.

"In our judgment, the law was accurately stated by Judge Wallace, in the *R. W. Rogers Case*, 70 Fed. Rep. 1017. In his language, 'a body of associates who organize a corporation for manufacturing and selling a particular product are not lawfully entitled to employ as their corporate name in that business the name of one of their number when it appears that such name has been intentionally selected in order to compete with an established concern of the same name, engaged in similar business, and divert the latter's trade to themselves by confusing the identity of the products of both, and leading purchasers to buy those of one for those of the other. No person is permitted to use his own name in such a manner as to inflict an unnecessary injury

9—*International Silver Co. v. Rogers*, 72 N. J. Eq. 933 (Court of Errors & Appeals, 1907).

upon another. The incorporators chose the name unnecessarily, and having done so for the purpose of unfair competition, cannot be permitted to use it to the injury of the complainant.'

"This rule is sustained by the later cases in the Federal courts. *Garrett v. T. H. Garrett & Co.*, 78 Fed. Rep. 472; *Bissell Chilled Plow Works v. T. M. Bissell Plow Co.*, 121 Fed. Rep. 357; *Wyckoff, Seamans & Benedict v. Howe Scale Co.*, 122 Fed. Rep. 348.

"It was adopted in Connecticut in one of the early cases on this subject (*Holmes, Booth & Haydens v. Holmes, Booth & Atwood Manufacturing Co.*, 37 Conn. 278), and is now established in New York; *De Long v. DeLong Hook and Eye Co.*, 35 N. Y. Sup. 509; *Charles S. Higgins Co. v. Higgins Soap Co.*, 144 N. Y. 462, 39 N. E. Rep. 490." ¹⁰

The fact that affidavits in opposition to an injunction against the use of a corporate name in violation of complainant's rights, show that the defendant corporation had no intention of manufacturing anything manufactured by complainants, is immaterial where defendant's charter empowers it to do so.¹¹

An injunction may be granted on the preliminary hearing as to the use of the name. "The affidavits put in by defendants in connection with the admitted facts in the case, satisfy me that it is highly improbable, if not quite impossible, that the defendants will succeed at the final hearing. The cost and trouble of changing their name by eliminating the word 'Edison,' will be slight, and if on final hearing they shall succeed in establishing their right thereto, the cost of restoring it will be equally slight." ¹²

An injunction will lie to restrain the unauthorized use of one's name by a corporation as a part of its corporate title or in connection with its business or advertisements, though he is not a business competitor.¹³ And injunction is a proper remedy to prevent a corporation from including in its name the surname of an inventor already adopted and used by another corporation with his consent.¹⁴

But the use of a name descriptive of a patented device used in connection with the business will not be restrained.¹⁵

22. THE COMMON OR CORPORATE SEAL.

The ancient rule of the common law was that "a corporation could neither act, speak, nor *whisper* apart from the instrumentality of its common seal. But the rule, opposed as it was to the demands of prac-

10—*International Silver Co. v. Rogers Corporation*, 67 N. J. Eq. 646 (Court of Errors & Appeals, 1904).

11—*Edison Storage Battery Co. v. Edison Automobile Co.*, 67 N. J. Eq. 44 (1904).

12—*Edison Storage Battery Co. v. Edison Automobile Co.*, 67 N. J. Eq. 44 (1904).

13—*Edison v. Edison Polyform & Mfg. Co.*, 73 N. J. Eq. 136 (1907).

14—*Edison Storage Battery Co. v. Edison Automobile Co.*, 67 N. J. Eq. 44 (1904).

15—*Edison v. Mills Edisonia*, 70 Atl. 191 (1908).

tical business necessity, suffered at an early day, in England, important modifications; and in this country, since the decision in *Bank of Columbia v. Patterson*, 7 Cranch 304, the doctrine has received but slight recognition, and now it may be considered as practically abrogated. In this state, in the case of *Baptist Church v. Mulford*, 3 Halst. 182, the subject received full consideration in the Supreme Court, and the authorities bearing on the subject were quite fully collated. Since the decision in that case the question has, in this state, been considered as at rest."¹ A corporate deed, however, must be under seal.

Chapter 89 of the Laws of 1904 provides that "no deed or other instrument mentioned in the twenty-first section of the act to which this is a supplement heretofore or hereafter made, excepting deeds or instrument made by a corporation or corporations, shall be void for lack of a seal; *provided*, the attestation clause and the acknowledgment or proof shall recite that the same was signed and sealed by the makers thereof."

When a corporate seal appears to be affixed to a deed it is not necessary that the party producing the deed should prove by witnesses the fact of its having been regularly fixed by authority of the corporation and if it is alleged that it was affixed by the hand of a stranger, that must be proved by the party who alleges it, and he will be required to produce such evidence as shall be clear and satisfactory.²

The testimony of a single corporate officer, whose duty might or might not make him cognizant of their execution, that he had no knowledge of corporate authority having been given to execute certain deeds, is deemed legally insufficient to overcome the presumption of due execution to which the affixing of the corporate seal gives rise.³

In *Whitehead v. Hamilton Rubber Co.*,⁴ it was held that the presumption that an instrument to which the seal of a corporation is duly attached was first authorized by the corporation, is overcome by proof that the authority for the execution of such instrument was given at a special meeting of the directors, at which all were not present, there being no proof that the absent ones had any notice of such meeting. The authority of this decision is questionable.

In a later case it was held that the presumption of authority arising from the execution under the corporate seal by the president and secretary of an acceptance of an ordinance is not rebutted by the ab-

1—Knapp, J., in *Crawford v. Longstreet*, 43 N. J. L. 325 (1881).

2—*Parker v. Washoe Manufacturing Co.*, 49 N. J. L. 465 (Court of Errors & Appeals, 1887). Citing *Baptist Church v. Mulford*, 8 N. J. L. 182 (1825); *Leggett v. N. J. Manufacturing & Banking Co.*, 1 N. J. Eq. 541 (1832).

3—*Parker v. Washoe Mfg. Co.*, 49 N. J. 465 (Court of Errors & Appeals, 1887); see also *Manhattan Mfg. Co. v. N. J. Stockyard Co.*, 23 N. J. Eq. 161 (1872).

4—52 N. J. Eq. 78 (1893).

sence of any written minutes showing that a meeting was held at which they were empowered to execute it.⁵

A corporate deed can be proved only by proving that the seal affixed is the seal of the corporation, or that it was affixed as the corporate seal by an officer of the corporation or other person thereunto duly authorized.⁶ The courts do not take judicial notice of the seal of a private corporation. Its authenticity must be shown by testimony.⁷

An impression of a distinctive corporation seal, without wax or wafer, on an instrument calling for the seal of the corporation, is held to be a seal.⁸

23. THE PRINCIPAL OR REGISTERED OFFICE.

The Corporation act provides (§ 44) that every corporation shall maintain a principal office in this state, and have an agent in charge thereof, wherein shall be kept the stock and transfer books for the inspection of all who are authorized to see the same, and for the transfer of stock.

Every certificate, report or statement now or hereafter required by any law of this state to be made to any officer or department of this state, or to be published, filed or recorded by any corporation, domestic or foreign, shall, in addition to the other matter required by law, set forth the location (town or city, street and number, if number there be) of its principal office in this state, and the name of the agent therein and in charge thereof, and upon whom process against the corporation may be served. No certificate, statement or report shall hereafter be received, filed or recorded by any officer or in any office of this state unless the same shall comply with the foregoing provisions. Such office of any domestic corporation so registered shall be and be deemed the office and post-office address of such domestic corporation, its officers, directors and stockholders, and whenever by the provisions of any law of this state any notice is required to be given to the corporation, its officers, stockholders or directors, such notice shall be sent by mail or otherwise, as the law may require, to such registered office, and such notice so given shall be and be deemed sufficient notice. Whenever by any law of this state in any such certificate, report or statement, the residence or post-office address of any incorporator, stockholder, director or other officer is required to be set forth or given, it shall be and be deemed a full compliance with such provision to give as such post-office address, the post-office address of the registered office of the company within this state.¹

5—Mercer County Trac. Co. v. United N. J. R. R. & C. Co., 65 N. J. Eq. 574 (1903).

6—Osborn v. Tunis, 25 N. J. L. 633 (Court of Errors & Appeals, 1856).

7—Den v. Vreelandt, 7 N. J. L. 352 (1800); Vaughn v. Hankinson's Admr., 25 N. J. L. 79 (1871).

8—Corrigan v. Trenton Delaware Falls Company, 5 N. J. Eq. 52 (1845).

1—P. L. 1898, p. 410.

Every corporation shall keep at its principal and registered office in this state the transfer books in which the transfer of stock shall be registered, and the stock books, which shall contain the name and address of the stockholders, the number of shares held by them respectively, which shall at all times during the usual hours for business be open to the examination of every stockholder.²

The name of every corporation shall be at all times conspicuously displayed at the entrance of its principal office in this state.³

The board of directors of any corporation, organized under the laws of this state, may change the location of the principal office of such corporation within this state to any other place within this state by resolution adopted at a regular or special meeting of such board, by the votes of at least two-thirds of the members of such board; provided, that no certificate shall be required to be filed of the removal of any office from one point to another in the same town, township or city in this state. Upon the adoption of a resolution as aforesaid, a copy thereof shall be filed in the office of the secretary of state, signed by the president and secretary of such corporation, and sealed with its corporate seal; for filing the said certificate, the secretary of state shall charge a fee of five dollars.⁴

The statutory agent for the service of process may be a corporation.⁵

24. BY-LAWS.

It is incidental to every corporation, to have the power of making by-laws, regulations and ordinances, relative to the purposes for which it was instituted. But this incidental power of legislation is limited not only by the terms of the charter, according to the maxim, "*Expressum facit cessare tacitum*," but by the spirit and design of the charter: the purpose for which it was created, the object which the legislature had in view, and the general principles and policy of the common law, and whenever a by-law seeks to alter a well settled and fundamental principle of the common law, or to establish a rule interfering with the rights, or endangering the security of individuals or the public, a statute, or other special authority, emanating from the creating power, must be shown to legalize it.¹

The Corporation act provides (§ 1, par. 5) that every corporation shall have power to make by-laws fixing and altering the number of its directors, and providing for the management of its property, the regulation and government of its affairs, and the transfer of its stock, with penalties for the breach thereof not exceeding twenty dollars.

The act further provides (§ 11) that the power to make and alter by-laws shall be in the stockholders, but any corporation may, in the

2—Corporation Act, § 33, as amended by P. L. 1898, p. 408.

3—Corporation Act, § 45.

4—P. L. 1897, p. 175.

5—Franklyn v. Taylor Hydraulic, etc., Co., 68 N. J. L. 113 (1902).

1—Taylor v. Griswold, 14 N. J. L. 222 (1834).

certificate of incorporation confer that power upon the directors; by-laws made by the directors under power so conferred may be altered or repealed by the stockholders.

The statute provides that the following matters may be regulated by the by-laws: Manner of calling and conducting meetings of the stockholders, determination of quorum at stockholders' meetings and at the annual election (unless fixed by the certificate of incorporation), mode of voting at meetings, time and notice to be given of the annual election, classification of directors if authorized by the certificate of incorporation, whether officers shall be elected by the stockholders or by the directors, duties of the president, secretary and treasurer and other officers, if any; giving of a bond by the treasurer, manner of filling vacancies among the directors and officers, manner of election or appointment and tenure of other officers, agents, etc., manner of transferring stock on the company's books, voting qualifications of stockholders (unless provided for by the certificate of incorporation), offices out of the state, authorize the directors to meet and keep corporate books out of the state, date of declaration and payment of dividends (unless specified in the certificate of incorporation), directors' power to fix amount of profits to be reserved as working capital.

If a by-law be unreasonable in a legal sense, it is contrary to the law of the state.² "Every by-law must be reasonable in itself."³

Rules of a private water company which purport to authorize the water company to refuse to furnish water to certain premises until arrears for water rents standing against a prior owner were paid, are void for unreasonableness.⁴

"The validity of the by-law of a corporation is purely a question of law. Whether the by-law be in conflict with the law or with the charter of the company, or be in a legal sense unreasonable, and therefore unlawful, is a question for the court and not for the jury. But the by-laws of a private corporation bind the members only by virtue of their assent, and do not affect third persons. All regulations of a company affecting its business, which do not operate upon third persons, nor in any way affect their rights, are properly denominated by-laws of the company, and may come within the operation of the principle. Within this limit it is the peculiar and exclusive office of the court to decide upon the validity of the regulation. But there is another class of regulations, made by corporations, as well as by individuals, who are common carriers of passengers, which operate upon, and affect the rights of others which are not, properly speaking, by-laws of the corporation, and which do not fall within the operation of the principle. Of this character are regulations touching the comfort and convenience of travellers, or prescribing rules for their conduct to secure the just rights of the company. It is not perceivable of this class

²—Paxson v. Sweet, 13 N. J. L. 196 (1832).

³—Bac. Abr. Tit. By-Law.

⁴—McDowell v. Avon-By-The-Sea, etc., Co., 71 N. J. Eq. 109 (1906).

of regulations, that they are never unreasonable unless they are unlawful. On the contrary, they are unlawful because they are unreasonable, or an unnecessary infringement of the rights and liberty of the passengers. The reasonableness and validity of a regulation, that passengers by railroad or steamboat should exhibit their tickets when reasonably requested, that they should not smoke or indulge in other filthy, or offensive practices; that male passengers should not enter a car or saloon, especially appropriated to females, may be conceded, and the right of the company to enforce them, even by excluding, in case of necessity, the offending passenger from the train. But it would scarcely be contended that a regulation requiring passengers continually, and as often as the caprice or malice of a conductor might require it, to exhibit their tickets; forbidding them to speak, or change their seats from one part of a car or saloon, to another, when the right of no other passenger was affected, was a regulation lawful in itself or which might safely be enforced. This latter case of regulations are no more in violation of the charter of the company, or of any particular statute, than the former. But they would be held unlawful, because they are unreasonable, and an unnecessary infringement of the right and liberty of travellers. The distinction between such regulations as are necessary, and conducive to the comfort and convenience of travellers, or to protect the rights of the company, must from its very nature be a question of fact rather than of law. The reasonableness and unreasonableness of the regulation is properly for the consideration, not of the court, but of the jury.”⁵

“That the reasonableness of a by-law of a corporation is a question of law and not of fact, has always been the established rule; but in the case of *State v. Overton*, 4 Zab. 435, a distinction is taken in this respect between a by-law and a regulation, the validity of the former being a judicial question, while the latter was regarded as a matter *in pais*. * * * There is no doubt that the rule thus intimated is in opposition to recent American authorities. Nor have I been able to find in the English books any such distinction as that above stated between a by-law and a regulation of a corporation. The submission of such a question to a jury appears on many grounds objectionable and in opposition to legal analogies. But the rule thus indicated was explicitly adopted and enforced in the *Morris & Essex R. R. ads. Ayers*, 5 Dutcher 393, and I think that decision is binding on this court. * * * The question is one of so much importance, that it will, doubtless, before long, be presented for the consideration of the Court of Errors, when it will be definitively adjudicated. In the meantime, I think the decision just alluded to must be followed.”⁶

In *Daniel v. North Jersey Street Railway Company*, 64 N. J. L., 603,

5—*State v. Overton*, 24 N. J. L. 435 (1854); *Morris v. Essex R. R. Co. ads. Ayres*, 29 N. J. L. 393 (1862)

6—*Beasley, C. J.*, in *Compton v. Van Volkenburgh & N. J. R. R. & Tr. Co.*, 34 N. J. L. 134 (1870).

(1900), Mr. Justice Garrison in the opinion of the Court of Errors and Appeals said:

"Whether as a class, questions as to the reasonableness of corporate regulations are for the jury, to be taken from it only when deemed to be free from doubt; or whether they are primarily court questions, to be left to juries only when some other standard than that of reasonableness enters into the test of corporate duty, is a point upon which the majority is not agreed *inter sese*.

"It suffices for the decision of the present case to say that in either of these views it was error to leave to the jury the reasonableness of this regulation. It should have been decided by the court. To this extent the cases of *State v. Overton*, 4 Zab. 435; *Morris and Essex Railroad Co. v. Ayers*, 5 Dutcher 393; *Compton v. Van Volkenburgh*, 34 N. J. L. 134, are disapproved; although the learned judge who tried the case did right to follow these Supreme Court decisions for the reasons given by Chief Justice Beasley in the *Compton* case." The regulation in question was one prohibiting the carrying of live animals in the cars of the street railway company.

The question whether a regulation adopted by a corporation for the government of its employees is invalid for unreasonableness is a question for the court and not one to be submitted to the jury.⁷

Whether any particular by-law forms a part of the contract between the stockholders depends upon the time when, and the circumstances under, which, it was adopted. If it was adopted as a part of the original organization of the company, so that the subscriptions of stock were made and money paid thereon upon the strength of it, then it becomes a part of the fundamental contract between the stockholders. Thus where a provision for cumulative voting was adopted in the by-laws for the purpose of perpetuating the provision in the original articles of association, that each of the parties to it should be represented in the board of directors, it was held that it formed a fundamental contract between the parties.⁸

"It was urged by the counsel of defendants, in his able and ingenious argument, that the rule of the majority is the law of the corporation and must govern; and that to hold this by-law irrevocable except by a two-thirds vote of all the stockholders, is in derogation of this law. The authority relied upon for this position is *Durfee v. R. R. Co.*, 5 Allen 230. That case, as I read it, is in direct conflict with the line of cases in this state culminating in *Mills v. Central R. R. Co.* above cited. Its reasoning is expressly repudiated by chancellor Zabriskie, in *Zabriskie v. Railroad Co.*, 18 N. J. Eq. 178."⁹

Where the by-laws of a corporation contained a provision that they could only be altered or amended at an annual meeting or a special

7—Walker v. John Hancock Life Ins. Co., 75 N. J. L. 281 (1907).

8—Loewenthal v. Rubber Reclaiming Co., 52 N. J. Eq. 440 (1894).

9—Vice-Chancellor Pitney in Loewenthal v. Rubber Reclaiming Co., 52 N. J. Eq. 440 (1894).

meeting called for that purpose, of which thirty days' notice should be given by publication, and that no amendment shall be made unless thirty days' previous notice thereof should have been given, it was held, that where notice was given by publication only, and no personal notice was sent to the stockholders, and such notice did not specify any particular change or alteration of any by-law, the amendments made were nugatory.¹⁰

Where a corporation by its by-laws designated a particular officer as its agent to receive moneys due it, the members of the corporation are charged with notice of such regulation or by-law and payment to any other officer or person can only bind the corporation, if it actually receives the money. If, however, notwithstanding such by-law or regulation the corporation by its conduct authorizes or by its action ratifies payment to some other than the designated agent, it will be bound. But to thus bind the corporation by estoppel or on the ground that it has authorized or ratified, it must, in each instance, be shown that the directors thereof knew of the conduct of the officer and acquiesced in or ratified it passively or actively.¹¹

25. THE CORPORATE BOOKS AND RECORDS.

It is the duty of the directors of a corporation, as it is the duty of all trustees and agents, to keep books of account of the corporate business. This common law duty has not been modified in any manner by statute. The statute does provide, however, that every corporation shall keep at its principal office in the state a stock book containing the names and addresses of the stockholders, with the number of shares held by each, and a transfer book in which the transfers of stock shall be registered.

The directors of a corporation may cause a new stock book to be prepared and such a book is entitled to the evidential force prescribed by the statute.¹

The statute (Corporation Act, § 12) requires the secretary to keep a record of the minutes and proceedings of the corporation. The minutes need not be entered up in the handwriting of the secretary; it is sufficient if they are entered under his direction and approved by him. And a resolution regularly made at a corporate meeting, if proven, is binding, though never entered upon the minutes.²

The corporate books are the property of the corporation. Thus where the secretary of a corporation bought a set of books with his own funds and entered in them the minutes of the proceedings of the corporators, and received in them the subscriptions of stock, it was held that the

10—Johnson v. Mutual Guarantee B. & L. Association, 66 N. J. L. 683 (1901).

11—Manchester Bldg. & Loan Association v. Geyer, 71 N. J. Eq. 192 (1906).

1—In re Cedar Grove Cemetery Co., 61 N. J. L. 422 (1898).

2—Wells v. Rahway White Rubber Co., 19 N. J. Eq. 402 (1869).

possession of the secretary was the possession of the company; that in going out of office the secretary had no right to take the books with him; that he had no lien on the books, either for the purchase money or for his services as secretary, or for the use and occupation of his premises by the company, while he was secretary, and that the company was entitled to a peremptory mandamus to compel the delivery of the books to the corporation.³

The minutes of a board of directors of a corporation are admissible to show the contractual intent of the corporation and the authority of the officers appointed to carry out the corporate act determined on, but they are not binding on strangers, nor are they sufficient evidence of a contract between a corporation and one of its members, for the business transactions of a corporation with its members stand on the same footing as those with a stranger.⁴

Entries in the books of a corporation are, as a general rule, competent evidence of the proceedings of the corporation, and of the acts and votes of its officers transacted at official meetings; but such entries are not notice to third persons of acts or resolutions entered on its minutes, so as to raise up against them an equitable estoppel arising from a consent to the proceedings.⁵

Although not usually evidence against third persons, yet corporate books are evidence of such proceedings in cases where it is competent or necessary to prove them.⁶

If a resolution passed at a meeting of the board of directors of a corporation was correctly recorded, then the minutes afford the best evidence as to the contents of the resolution, and none other will be received when the minutes are at hand; if the correctness of the minutes is to be attacked it is necessary first to offer them for that purpose.⁷

At common law the members of any corporation were entitled to inspect the books of the corporation. The only difference between business and other corporations as to the right of inspection was this: The books of municipal corporations and guilds might be inspected by non-members under certain circumstances, because the regulations of such bodies were not binding on the members alone, and consequently outsiders might be vitally interested in the corporate proceedings. Business corporations, on the other hand, were private, and the right of inspection belonged solely to members.⁸

The sole remedy of a stockholder wrongfully refused inspection of

3—State ex rel. Newark & N. Y. R. Co. v. Goll, 32 N. J. L. 285 (1867).

4—Fleming v. Reed, 77 N. J. L. 563 (Court of Errors & Appeals, 1908); Black v. Shreve, 13 N. J. Eq. 455 (Court of Errors & Appeals, 1860).

5—Wetherbee v. Baker, 35 N. J. Eq. 501 (Court of Errors & Appeals, 1882).

6—North River Meadow Co. v. Shrewsbury Church, 22 N. J. L. 424 (1850).

7—Durbrow v. Hackensack Meadows Co., 77 N. J. L. 89 (1908); Van Hook v. Somerville Mfg. Co., 5 N. J. Eq. 137 (1845).

8—Select Essays in Anglo-American Legal History, Vol. III, p. 228.

the books or papers of a corporation is by mandamus. In the earlier English cases the judges of the king's bench generally refused that prerogative writ where the defendant was a private corporation, but its jurisdiction to grant it is indisputable, and in this country, where the corporate rights rest on statute, the exercise of such jurisdiction is universal.⁹

"It will be found that the cases in this country where production, for inspection, has been ordered in an independent proceeding, not strictly mandamus, have been in states where the jurisdiction of the courts of law and equity has been blended, and the line of demarcation between remedies has become indistinct.

"Our court of chancery claims no inherent jurisdiction in this regard. In *Stettauer v. New York and Scranton Construction Co.*, 15 Stew. Eq. 46, 53, Chancellor Runyon held that the mere refusal of permission to a stockholder to examine the books of a corporation was not a ground for equitable interference, the law furnishing an adequate remedy in the writ of mandamus, and he sustained a demurrer to a bill filed to compel such permission. The same learned chancellor, however, was of opinion that a provision of the General Corporation act, substantially the same as that above cited, authorized the compulsory production in this state, and impliedly, inspection, of the books (but not other papers and memoranda) of a corporation that, by the grace of the legislature, were customarily kept without the state, and this on the mere petition of a stockholder that he was denied such inspection; and he made order accordingly. (*Huyler v. Cragin Cattle Co.*, 40 N. J. Eq. 392 (1885); s. c. 42 N. J. Eq. 139 (1886.)) Vice-Chancellor Bird ordered production for inspection under like circumstances. (*Mitchell v. Rubber Co.*, 24 Atl. Rep. 407.) There are probably other unreported cases of the assumption of such a power, but we think it unauthorized. It is, at least, doubtful whether, since the adoption of the constitution of 1844, this branch of the jurisdiction of our supreme court can be conferred on another tribunal. (*Flanigan v. Guggenheim Smelting Co.*, 63 N. J. L. 647; *Green v. Heritage*, 64 N. J. L. 567.) As we construe the statute involved, the legislature has not attempted to do so.

"As now subsisting, section 44 of the General Corporation act, after declaring that the directors of any corporation may, if the by-laws or certificate of incorporation so provide, keep the books of the corporation, except the stock and transfer books, outside of the state, provides as follows:

"The court of chancery or the supreme court, or any justice thereof, may, upon proper cause shown, summarily order any or all of the books of said corporation to be forthwith brought within this state, and kept therein at such place and for such time as may be designated in such order, and the charter of any corporation failing to comply with such

⁹—*Rosenfeld v. Einstein*, 46 N. J. L. 479 (1884). See also *Commonwealth v. Phoenix Iron Co.*, 105 Pa. St. 111, where the authorities are cited.

order may be declared forfeited by the court making such order, and it shall thereupon cease to be a corporation, and all its directors and officers shall be liable to be punished for contempt of court for disobedience of such order.'

"We discern in this state no legislative purpose to enlarge jurisdiction for the compulsory production of books for inspection. The true construction of the section quoted, so far as it confers power upon a justice of the supreme court or upon the court of chancery, is that whenever proper cause is shown to the judicial authority whose action is invoked, the books of a corporation that are by law permitted to be kept outside the state may be summarily ordered brought within the territorial control of such judicial authority. Proper cause would be shown by presenting a situation within the range of such authority, in which the production of the books would subserve some lawful or useful end within the judicial control. No other jurisdiction is conferred.

"The statute is useful, if not necessary, because of the summary character of the proceeding it authorizes, because of its drastic penalty for disobedience, and because cases may, and frequently do, arise where the corporation itself is not a party to litigation in which, nevertheless, its books may be legal evidence, but it cannot be construed so as to support the order appealed from, which must, therefore, be reversed."¹⁰

In *National Packing Company v. Garven* (decided November, 1910), the Court of Errors and Appeals held that it is of the essence of the statutory order requiring corporate books to be brought within the state that the facts upon which the propriety of the cause for such order rests be laid before the judicial officer who in the exercise of his discretion is charged with the determination of that precise question, and that the omission of such facts from the petition could not be justified upon the ground that to lay such facts before the statutory tribunal would be to divulge the secrets of the grand jury and thus to defeat the ends of criminal justice.

In *Stettauer v. New York & Scranton Construction Co.*, 42 N. J. Eq. 46 (1886), it was urged, on behalf of the complainant, that the legislature had conferred upon the Court of Chancery power to compel the production of the books of a corporation. Chancellor Runyon, however, said:

"But the power conferred by that section is granted in the special case of a corporation of this state unlawfully keeping its books out of the state. The authority thus given is to be exercised in a summary way and in a special case. It is conferred not only upon the Chancellor, but also upon the Chief-Justice and each of the associate Justices of the supreme court. It cannot properly be construed to confer upon this court any power over corporations which it did not possess before

10—*Fuller v. Hollander & Co.*, 61 N. J. Eq. 648 (Court of Errors & Appeals, 1900); see also *Trimble v. American Sugar Refining Co.*, 61 N. J. Eq. 340 (1901); *National Packing Co. v. Garven*, 78 Atl. 703 (Court of Errors & Appeals, 1910).

the passage of the act, except that which is specifically given. The act is indeed a remedial law, and it must, notwithstanding its penal character, be construed liberally (*Huyilar v. Cragin Cattle Co.*, 40 N. J. Eq. 392 [1885]), but it will not admit of such a construction as to confer upon this court the power to compel the production of the books of a corporation for inspection and examination in cases not contemplated by the act. This court has, of course, power to compel such production for the purpose of obtaining evidence to be used in a cause; but the object of the application here is to ascertain whether there is any ground of complaint in reference to the conduct of the directors, against whom no charge is made nor any imputation cast. No reason is presented for calling them to an account in this court, except the allegation that they deny the complainant's right to have the aid of an expert accountant in his examination of the books, and accordingly, refuse to permit him to examine the books unless he do it without such assistance. The complainant sues for himself alone to obtain permission to examine the books with professional aid, to see whether he has cause of suit or not. Should an opportunity be accorded to him, and should he fail to discover any fraud or mistake or culpable mismanagement, this suit would be at an end. Should he find such ground of relief, he would be compelled to amend his bill, in order to introduce it. The law gives him an adequate remedy to enable him to discover whether he is aggrieved or not. If he shall find that he is aggrieved, this court will be open to him."

The writ of mandamus is not to be given to gratify curiosity or for speculative purposes, but only when its exercise is sought in good faith and for a specific purpose. Such purpose must appear by the proofs on the application or the writ will be denied. The allowance of the writ is within the discretion of the court, upon the facts presented in each particular case.¹¹

The statutory provision which authorizes the chancellor, or the supreme court, or any justice thereof, to order that the books of a corporation be brought into this state, does not, by implication, extend to the papers and memoranda of the company.¹²

In *O'Hara v. National Biscuit Co.*, 69 N. J. L. 198 (1903) it was held by the supreme court that the statutory right of a stockholder to inspect the stock and transfer books is not an absolute right, but like the common law right of inspection of corporate books in general its enforcement by writ of mandamus is within the discretion of the court. In the opinion of the court Mr. Justice Garrison said: "This application involves the question whether the qualified right of a stockholder to inspect the books of his corporation, as that right existed in common law, has, with respect to stock and transfer books been transformed

11—*Bruning v. Hoboken Printing & Publishing Co.*, 67 N. J. L. 119 (1902); *Rosenfeld v. Einstein*, 46 N. J. L. 479 (1884); *Garcin v. Trenton Rubber Mfg. Co.*, 60 Atl. 1098 (1905).

12—*Huyilar v. Cragin Cattle Co.*, 42 N. J. Eq. 139 (1886).

into an unqualified right by force of the thirty-third section of the Corporation act of this state. At common law such restrictions as were imposed upon this right, whether as to mode of procedure or matter of substance, were judicial regulations incident to the exercise of a discretionary power over a topic not covered by specific legislation. It is not perceived that the enactment of such legislation infringes upon any prerogative recognized under our judicial system. If the legislature has conferred upon all stockholders an absolute right to inspect certain corporate books for all purposes, the duty of the court is to enforce such right by its writ of mandamus. The rule of the common law with respect to the right of stockholders to obtain, by writ of mandamus, an inspection of corporate books, is correctly stated in the opinion delivered in this court in the case of *Bruning v. Hoboken Printing & Publishing Co.*, 67 N. J. L. 119."

After quoting the language of the section the opinion proceeded "I do not find in this language a legislative grant broad enough to cover the plaintiff's contention, or discover in it any purpose to dispense with the judicial discretion incident to the enforcement of its provisions. * * * The right is given to 'stockholders,' a term that not only defines the class upon which the right is conferred, but also indicates the capacity in which the right is to be enjoyed, namely, that it must be with respect to the relator's interests as a stockholder, or be germane to his status as such. If this is the correct interpretation of this language, it affords no support for the relator's contention that it confers upon him a right superior to, and in excess of, that obtainable under the settled practice of the discretionary proceeding that he has invoked. If, however, instead of interpreting the language of the legislative grant, we pass to its construction, a like effect must be given to it, so far as this relator is concerned."

The court then reviewed the history of these statutory provisions from their original enactment as part of a statute of 1825, entitled "An act to prevent fraudulent elections by incorporated companies and to facilitate proceedings against them." Under this title it was continued in the Revised Statutes of 1846. In the revision of 1874 it was transferred to and re-enacted in the revision of that year as section 36 of "An act concerning corporations." In 1896 it was again re-enacted in the revision of that year as section thirty-three of "An act concerning corporations," omitting the words "for thirty days prior to any election of directors," and without further modification, was continued in the amended act of 1898.

The opinion then proceeds: "The effect to be given to this course of legislation is definitely settled by the decision rendered in the Court of Errors and Appeals in the case of *Hendrickson v. Fries*, 45 N. J. L. 555. The statutory provision under review in that case was 'every warrant of attorney for confessing judgment which shall be included in the body of any bond, bill or other instrument for the payment of money shall be void and of no effect; and such bond, bill or other in-

strument shall have the same force, and no other, as if the said warrant of attorney had not been incorporated therein.'

"The contention of the plaintiff in error in that case was that this statute, standing in unqualified terms as part of the general act, laid down a general rule with respect to its subject-matter." In disposing of this contention adversely, Mr. Justice Depue, delivering the opinion of the court, said: "The statutory provision in question was passed in 1799 as section 13 of an act entitled 'An act to regulate the practice of courts of law.' (Rev. L. p. 415.) It was continued in the Practice Act in the revision of 1846. (Rev. Stat. p. 931.) In the revision of 1874 it was transferred to and re-enacted as section 1 of 'An act directing the mode of entering judgments on bonds with warrants of attorney to confess judgments.' (Rev., p. 81.) Under the provisions of our constitution the title of a statute is not only an indication of the legislative intent, but is also a limitation upon the enacting part of the law. It can have no effect with respect to any object that is not expressed in the title. Applying this canon of construction, I think it is clear that this statute must be construed to be a mere regulation of the practice in our own courts."

Mr. Justice Garrison then continues: "Inasmuch as the limitation to the 'practice in our own courts' is derived entirely from the title under which this statute was originally passed, and is not referable to the title under which it was re-enacted, the doctrine of the decided case is that, where a statute is originally passed under a title that limits its provisions, the re-enactment of such provisions in subsequent revisions of the laws, under the title that has no limiting effect, will not remove the limitations imposed by the original title.

"Applying this canon of construction which is binding upon this court, to the section of the revised Corporation act on review, we must hold that the limitations imposed upon it by the title under which it was originally passed followed it through its subsequent transferences and re-enactments, so that, under the title of 'An act concerning corporations,' it is still to be construed as if it stood under the title of 'An act to prevent frauds in the elections of incorporated companies and to facilitate proceedings against them.' Thus construed it does not extend the rights of stockholders beyond those customarily accorded to them at common law, and affords no ground for the claim that the discretionary nature of the proceeding now invoked has been abrogated or in anywise disturbed. The result is that, whether we resort to interpretation or construction, the relator has not shown himself to be entitled to the writ for which he asks."

The authority of this decision, however, is questionable. In New York under a similar statutory provision it is held that the statutory right to inspect the stock book is absolute.

IV. CAPITAL STOCK AND DIVIDENDS.

26. THE CAPITAL STOCK OF A CORPORATION.

The phrase "capital stock," as employed in acts of incorporation, is very generally, if not universally, used to designate the amount of capital to be contributed by the stockholders for purposes of the corporation. The amount thus contributed constitutes the "capital stock" of the company. The value of the stock may be greatly increased by surplus profits or be diminished by losses, but the amount of the capital stock remains the same. The funds of the company may fluctuate. Its capital stock remains invariable, save by legislative enactment. Thus it was held that where a corporation was by the terms of its charter limited in its power of assessment to the sum designated as the amount of its capital stock, when that sum had been raised, the power of further assessment was exhausted.¹

Capital stock is, therefore, the sum fixed by the charter as the amount paid in, or to be paid in, by the stockholders for the prosecution of the business of the corporation, and for the benefit of the creditors of the corporation.²

27. AMOUNT OF CAPITAL STOCK; STATUTORY RESTRICTIONS AND LIMITATIONS.

The Corporation Act provides (§ 8) that the certificate of incorporation shall set forth the amount of the total authorized capital stock of the the corporation which shall not be less than two thousand dollars, the number of shares into which the same is divided and the par value of each share; the amount of capital stock with which it will commence business, which shall not be less than one thousand dollars; and, if there be more than one class of stock created by the certificate of incorporation, a description of the different classes, with the terms on which the respective classes of stock are created.

As to the other kinds of corporations included in the scope of this book, see Part II of this book.

28. DIVISION OF CAPITAL STOCK INTO SHARES.

The Corporation Act provides (§ 8) that the certificate of incorporation shall state the number of shares into which the capital stock is divided and the par value of each share. There is no statutory regulation as to the par amount of shares.

29. NATURE OF SHARES OF STOCK.

"The most accurate definition of the nature of the property acquired by the purchase of a share of stock in a corporation is that it is a

1—The State v. Morristown Fire Association, 23 N. J. L. 195 (1851).

2—Storage Company v. Assessors, 56 N. J. L. 389 (1894).

fraction of all the rights and duties of the stockholders composing the corporation. Such does not seem to have been the clearly recognized view till after the beginning of the nineteenth century. The old idea was rather that the corporation held all its property strictly as a trustee, and that the shareholders were, strictly speaking, *cestuis que trust*, being in equity co-owners of the corporate property." ¹

The Supreme Court of New Jersey has said that a share of stock represents the right which its owner has in the management and profits of the corporation.²

And again that stock is an intangible right or property, the shares being distinguishable from each other only by their respective owners. A certificate is usually issued by the company, showing the number of shares held by a person, and the amount paid thereon, which paper is recognized in mercantile transactions as evidence of the property it represents, and is surrendered when a transfer or sale is made.³

"Government and other securities, joint stock shares and the like, are nothing else (apart from any eventual liability to which they may expose the holders in some cases) than the right to receive a fixed rate of interest or annuity, or a dividend or share of profits not fixed, but often capable of approximate estimation beforehand. Such rights are as much property as the capital invested; whether they are a good equivalent for it is a question of fact with which legal principle has nothing to do. In fact we commonly regard a holder of stock or shares as still having the capital, and think of the interest or dividends as being the fruits of capital in the same way that rent and agricultural profits are the fruits of land. And this is substantially true for economic purposes, but legally the capital, as the investor's capital, does not exist; it has become the firm's or company's capital." ⁴

The situs of the stock of a domestic corporation is in New Jersey and any question relating to it may be determined here.

"The *res* demanded by the complainant being locally situate in this state; the demand made being, in fact, made on behalf of Pruyn, who is, if the complainant's claim be valid, beneficially, if not legally, entitled to it; the same *res* being also demanded by the receiver, Black, who claims in opposition to Pruyn, the case is clearly one of which this court has jurisdiction and Pruyn is a necessary party to the final and effective determination of the controversy. * * * This is not a proceeding *in rem*, where a general notice suffices to bind everybody. It is, as to the stock, a proceeding *quasi in rem*, where, as is said in *Hill v. Henry*, *supra*, following *Freeman v. Alderson*, 119 U. S. 185, the

1—Professor Williston in *Select Essays in Anglo-American Legal History*, Vol. III, p. 217.

2—*Storage Company v. Assessors*, 56 N. J. L. 389 (1894); see also *Donnell v. Wyckoff*, 49 N. J. L. 48 (1886); *Graydon's Executors v. Graydon*, 23 N. J. Eq. 229 (1872).

3—*Princeton Bank v. Crozer*, 22 N. J. L. 383, 386 (1850).

4—Pollock: *First Book of Jurisprudence*, p. 218.

individual to be bound must be specifically named as a party, and where, if he be a non-resident, it is imperative that a reasonable effort be made to notify him, such effort being made pursuant to a 'reasonable method provided by the state for imparting notice.' (Arndt v. Griggs, 134 U. S. 316.) If this be not done, the proceeding is not due process of law. If it be done, and he does not appear, he is, nevertheless, bound by the adjudication that may be made with respect to his interest in the *res*, but no further."⁵

The Court of Chancery has jurisdiction of a bill by a citizen and a foreigner to have shares in a New Jersey corporation held by foreign residents awarded to complainants, and to have their names placed on the stock register. In such a case where the court has enjoined transfer of the shares and appointed receivers of them, the foreign defendants may be brought in by substituted service. The foreign defendants alleged that they were beyond the reach of the court, and that no decree could be made inasmuch as the court was without jurisdiction as to them. Vice Chancellor Howell said, however, "The question so raised by the defendants is not new to this court. It was decided in *Andrews v. Guayaquil & Quito Railroad Co.*, 69 N. J. Eq. 211. There *Andrews* brought suit to compel the transfer of shares of the *Guayaquil & Quito Railroad Co.*, which he alleged should have been assigned to him as collateral security for certain notes made to one *Pruyn* and by *Pruyn* endorsed over to him. The *Equador Company* was interested. It had become insolvent, and its receiver was made a defendant. Both corporations were organized under the New Jersey Law. The receiver of the *Equador Company* answered and filed his cross bill against *Pruyn* for relief growing out of the same transaction. *Pruyn* pleaded non-residence, non-service and non-appearance. Vice Chancellor *Stevens* overruled the plea on the ground that the *res* of the controversy was here; that the shares in suit had their situs in this state, and that any question relating to them could be determined here; that the suit was *quasi in rem*, and that *Pruyn* was a necessary party."⁶

The general rule that the measure of damages for conversion is the market value of the property at the time of the conversion, is not applicable to the conversion of stocks and bonds which are commercial securities of a fluctuating value in the market. In New Jersey it is held that the rule that the highest intermediate value between the time of the conversion and the time of the trial is not the proper measure of damages and that the true measure of damages in such cases is the highest intermediate market value between the time of the conversion and a reasonable time after notice of the conversion within which to replace the securities.⁷

⁵—*Andrews v. Guayaquil & Quito Railway Co.*, 69 N. J. Eq. 211 (1905); affirmed 71 N. J. Eq. 768 (Court of Errors & Appeals, 1906); see also *Amparo Mining Co. v. Fidelity Trust Co.*, 73 Atl. 249 (Court of Errors & Appeals, 1908).

⁶—*Sohege v. Singer Mfg. Co.*, 73 N. J. Eq. 567 (1907).

⁷—*Dimock v. United States Nat. Bank*, 55 N. J. L. 296 (Court of Errors & Appeals, 1893).

30. POWER TO ISSUE STOCK; METHODS OF ISSUING STOCK; CERTIFICATE OF PAYMENT OF CAPITAL STOCK.

A corporation cannot issue stock except by express legislative grant. Accordingly it was held by the Court of Errors and Appeals that a by-law adopted by a mutual insurance company providing for a capital stock divided into shares, there being no authority therefor in its charter, was invalid.¹

The Corporation act provides (§ 48) that nothing but money shall be considered as payment of any part of the capital stock of any corporation organized under this act except as hereinafter provided in case of the purchase of property.

The act also provides (§ 49) that any corporation formed under this act may purchase mines, manufactories or other property necessary for its business, or the stock of any company or companies owning, mining, manufacturing or producing materials, or other property necessary for its business, and issue stock to the amount of the value thereof in payment therefor, and the stock so issued shall be full-paid stock and not liable to any further call, neither shall the holder thereof be liable for any further payment under any of the provisions of this act; and in the absence of actual fraud in the transaction, the judgment of the directors as to the value of the property purchased shall be conclusive; and in all statements and reports of the corporation to be published or filed this stock shall not be stated or reported as being issued for cash paid to the corporation, but shall be reported in this respect according to the fact.

The Corporation act also provides (§ 50) that corporations having for their object the building, constructing or repairing of railroads, water, gas or electric works, tunnels, bridges, viaducts, canals, hotels, wharves, piers or any like works of internal improvement or public use or utility, may subscribe for, take, pay for, hold, use and dispose of stock or bonds in any corporations formed for the purpose of constructing, maintaining and operating any such public works; and the directors of any such corporation formed for the purpose of constructing, maintaining and operating any public work of the description aforesaid may accept in payment of any such subscription, or purchase, real or personal property, necessary for the purposes of such corporation, or work, labor and services performed or materials furnished to or for such corporation to the amount of the value thereof, and from time to time issue upon any such subscription or purchase, in such installments or proportions as such directors may agree upon, full-paid stock in full or partial performance of the whole or any part of such subscription or purchase, and the stock so issued shall be full-paid stock and not liable to any further call, neither shall the holder thereof be liable for any further payments, and in all statements and reports of the corporation to be published or filed this stock shall not be stated or reported as

¹—State ex rel. Mutual Benefit Life Ins. Co. v. Utter, 34 N. J. L. 489 (1869).

being issued for cash paid to the corporation, but shall be reported in this respect according to the fact.

Under its general powers a corporation may issue stock for work and labor, but such an issue is upheld only where the contract for the rendition of services has been made in good faith and the services accepted in payment have been put in at a full, fair and bona fide valuation.²

Construing the provisions of sections 48 and 49 of the Corporation act, the Court of Errors and Appeals, in *Donald v. American Smelting, etc., Co.*, 62 N. J. Eq. 729 (1900), said: "The original issue of corporate stock is a special function, in the exercise of which the legislature has fixed the standard to be observed, and it is the duty of the courts, so far as their jurisdiction extends, to see that this standard is not violated, either intentionally or unintentionally. * * * The meaning of section 48 is not questionable. The money must equal the face value of the stock. The language of section 49 is even more explicit. The corporation may issue stock to the amount of the value of the property. The value of the property in the one case, just as the value of the money in the other, must at least equal the face value of the stock. Such was the view expressed for this court by Mr. Justice Depue in *Wetherbee v. Baker*, 35 N. J. Eq. 501 (Court of Errors and Appeals 1882), and supported by abundance of authority. The distinction between the contemplated issue of corporate stock for property and its issue for money lies, not in the rule for valuation, but in the fact that different estimates may be formed of the value of property. When such differences are brought before judicial tribunals, the judgment of those who are by law entrusted with the power of issuing stock "to the amount of the value of the property," and on whom, therefore, is placed the first duty of valuing the property, must be accorded considerable weight. But it cannot be deemed conclusive when duly subjected to judicial scrutiny. Nor is it necessary that conscious overvaluation or any other form of fraudulent conduct on the part of these primary valuers should be shown to justify judicial interposition. Their honest judgment, if reached without due examination into the elements of value, or if based in part upon an estimate of matters which really are not property, or if plainly warped by self-interest, may lead to a violation of this statutory rule as surely as would corrupt motive."³

"If the intrinsic value and market price of the company's stock were only sixty per cent. of its face, and an outsider were to offer eighty per cent. in money for additional stock to be issued, such an offer would clearly be advantageous to the company and its stockholders; but it could not be legally accepted, because the legislature has required that one hundred per cent., whether in cash or in property,

²—*Clevenger v. Moore*, 71 N. J. L. 148 (1904); *Wetherbee v. Baker*, 35 N. J. Eq. 501 (Court of Errors & Appeals, 1882).

³—*Donald v. American Smelting, etc., Co.*, 62 N. J. Eq. 729 (1900).

shall be received for corporate stock when originally issued. It is the illegality of the transaction which warrants complaint. Stockholders have the same right to prevent an issue of stock in violation of the statute as they have to prevent a use of corporate property beyond the scope of the corporate power, without regard to loss or gain." ⁴

In *Coler v. Tacoma Ry. & Power Co.*, 65 N. J. Eq. 347 (1903), the Court of Errors and Appeals held that an arrangement whereby a New Jersey company should transfer all its property and franchises, except the franchise of being a corporation, to a Washington company, and the latter should issue therefor to the New Jersey company shares of its stock at par, or in case any stockholder of the New Jersey company refused to accept such stock, then the Washington company should pay \$35 in cash in lieu of stock for each share so refused, shows on its face a purpose to issue stock at thirty-five per cent. of its par value, and that such issue should be enjoined.

A contract between two persons that, in exchange for their joint property, one of them should procure from a corporation of this state an original issue of stock to an amount known by all parties to be in excess of the value of the property, and should divide the stock thus procured with the other person, is illegal, and the courts of this state will not aid in its enforcement, even though the objectionable feature has been accomplished by the actual issue of the stock. "It must be remembered that under the laws of New Jersey, the stock of a corporation can be originally issued for property purchased only to the amount of what is honestly deemed by the directors the value of the property. (Citing *Donald v. American Smelting Co.*, supra.) * * * We conclude that according to the complainant's contention his bargain with the defendant was that the latter should get from the International Smokeless Powder and Dynamite Company an original issue of its stock, having a face value of \$350,000, at least, in exchange for property which nobody believed to be worth that sum in money, and should equally divide with the complainant whatever he thus obtained. The purpose of that bargain was plainly illegal. It is the settled policy of the courts in this state not to aid in the enforcement of such contracts, having either an illegal or an immoral purpose, even although the objectionable feature has been accomplished, and there remains only the distribution of the proceeds among the contracting parties." ⁵

The subscribers to the capital stock of a telegraph company, upon payment of \$8.33 per share, caused to be issued to themselves shares of full paid stock of the par value of \$25 each. At the same meeting

4—*Dixon, J.*, in *Donald v. American Smelting, etc., Co.*, 62 N. J. Eq. 729 (Court of Errors & Appeals, 1900). The same rule applies to stock issued pursuant to section 50 of the Corporation Act. *McCarter v. Pitman, etc., Gas Co.*, 74 N. J. Eq. 255 (1908). Or upon a consolidation. *Strickland v. National Salt Co.*, 76 Atl. 1048 (1910).

5—*Volney v. Nixon*, 68 N. J. Eq. 605 (Court of Errors & Appeals, 1905).

of stockholders, it was resolved that one hundred and fifty shares of the stock be issue to certain persons for services alleged to have been rendered by them to the company, without any account or statement of the amount due them. On application by such persons for a mandamus to compel the company to issue certificates for such shares, the Supreme Court held that the presumption was that full paid stock was to be issued upon payment of only \$8.33 per share, and that to the enforcement of a contract thus tainted with illegality the Court would not lend its sanction.⁶

The directors of a corporation, the incorporators of which had agreed to give sixty per cent of the stock to a person for two patents, were held to be justified in refusing to issue said stock where one patent had not been perfected, and the articles made under the other were worthless. The court of chancery refused to decree specific performance of such contract. The court said: "The officers very properly have never issued a single share. The complainant now asks this court by its decree to require the company to issue to him full paid stock of the company representing a par value of \$600,000, stamped as 'issued for property purchased.' If the officers had issued this amount of stock on the unsubstantial basis indicated, it would have been the duty of this court, if the question had been properly presented for decision, to have declared that such issue was fraudulent and not authorized by the true consideration of the act, and it cannot by its decree direct that to be done which it would thus condemn."⁷

An agreement to exchange property for fully paid capital stock of a company to be thereafter issued, cannot be enforced in a case where the property is not of the value of the nominal par of the stock, and there has been no adjudication by the board of directors that it is of such value.⁸

The directors of a corporation must, to make lawful the issue of stock in consideration of acquiring the stock of another corporation and to supply a sufficient consideration for a promise to pay an additional sum for such stock, make a bona fide appraisal of the actual cash value of the stock acquired at a sum equal to the par value of the stock to be issued together with the additional sum agreed to be paid. "Intentional disregard of the statutory rule involving an intentional over-valuation of the property purchased, is one form of the fraud prohibited by the statute. Issuing stock without any valuation at all—without making any appraisal or ascertainment of value of the thing bought—must, I think, likewise be condemned."⁹

6—Morton v. Timken, 48 N. J. L. 87 (1886).

7—Edgerton v. Electric Improvement, etc., Co., 50 N. J. Eq. 354 (1892).

8—Ecuadorian Association, Ltd. v. Ecuador Co., 71 N. J. Eq. 757 (Court of Errors & Appeals, 1907).

9—Stevenson, V. C., in Strickland v. National Salt Co., 72 N. J. Eq. 170 (1906); S. C. 76 Atl. 1048 (1910).

In *Voorhees v. Malott*, 73 N. J. Eq. 673 (1907), the Court of Errors and Appeals held that, where two and one-half months after purchasing certain property for \$450, the purchaser sold it to a corporation formed for the construction and operation of a hotel of which her husband was president and she was secretary, for \$3,000, of which \$1,000 was paid by the issuance of corporate stock to her at par, and the other \$2,000 was secured by a mortgage upon the property, the husband being in fact the real actor in the transaction, and immediately thereafter the corporation erected an hotel building on the land, and the company subsequently passed into the hands of a receiver, the sale was unconscionable, and the receiver was entitled to a decree crediting on the mortgage the difference between the cost of the land to the original purchaser and the price received by her from the corporation.

It has been held, however, that stock in a corporation issued as a bonus with the sale of bonds or stock issued through the means of over-valuation of the property, is not necessarily fraudulent as between the stockholders, in the absence of intervening rights of creditors.¹⁰

And in *Rural Homestead Co. v. Wildes*, 54 N. J. Eq. 668 (1896), the Court of Errors and Appeals held that where the stock of a cemetery company was almost without any market value, its exchange for an interest in land that might prevent disastrous competition was not so improvident as to shock the conscience and lead, in equity, to an invalidation of the sale at the suit of stockholders.

Where stockholders attack a proposed issue of stock for property, they are not required in their bill to show that the property has been over-valued. "The defendants insist that the complainants have not borne the burden cast upon them by law of proving that these items are not worth that sum, and certainly we would be unwilling now to adjudge that such a negative is established. But it must be remembered that the cause is yet in a preliminary stage; that the complainants have shown the value of everything which they could reasonably be expected to discover before instituting their suit; that the directors are their trustees, and are intending a very large issue of stock for property which they have not seen fit hitherto to define. Under these circumstances, the legal rule imposing the burden of proof on the complainant should not be rigorously applied. *Indeed, as these trustees are seeking to exercise a specially delegated power, which can be justly exercised only in accordance with a prescribed standard, it is not entirely clear that a burden does not rest on them, when challenged beforehand, to vindicate their proposed action.*"¹¹

An illegal issue of stock by a quasi public corporation for property

¹⁰—*Arnold v. Searing*, 73 N. J. Eq. 262 (1907).

¹¹—*Donald v. American Smelting, etc., Co.*, 62 N. J. Eq. 729 (Court of Errors & Appeals, 1900).

in excess of the value of the property may be set aside at the suit of the attorney general.¹²

The president and secretary, or treasurer upon payment of each installment of capital stock, and of every increase thereof, shall make a certificate, stating the amount of the capital so paid, and whether paid in cash or by the purchase of property, stating also the total amount of capital stock, if any, previously paid and reported; which certificate shall be signed and sworn to by the president and secretary or treasurer, and they shall, within ten days after such payment, cause the certificate to be filed in the office of the secretary of state.¹³

If any of said officers shall neglect or refuse to perform the duties required of them in the preceding section for thirty days after written request so to do by a creditor or stockholder of the corporation, they shall be jointly and severally liable for all its debts contracted before the filing of such certificate.¹⁴

31. POWER TO ISSUE PREFERRED AND OTHER SPECIAL CLASSES OF STOCK.

The Corporation act provides (§ 18, as amended by P. L. 1901, p. 245) that every corporation organized under this act shall have power to create two or more kinds of stock, of such classes, with such designations, preferences and voting powers or restrictions or qualifications thereof as shall be stated and expressed in the certificate of incorporation or in any certificate of amendment thereof; and the power to increase or decrease the stock as in this act elsewhere provided shall apply to all or any of the classes of stock; but at no time shall the total amount of the preferred stocks issued and outstanding exceed two-thirds of the capital stock paid for in cash or property, and such preferred stocks may, if desired, be made subject to redemption at any time after three years from the issue thereof, at a price not less than par, and the holders thereof shall be entitled to receive, and the corporation shall be bound to pay thereon, dividends at such rates and on such conditions as shall be stated in the original or amended certificate of incorporation, not exceeding eight per centum per annum, payable quarterly, half yearly or yearly; and such dividends may be made payable before any dividends shall be set apart or paid on the common stock, and such dividends may be made cumulative; provided, the corporation shall set apart or pay the said dividends to the holders of non-cumulative preferred stock before any dividend shall be paid on the common stock; and in no event shall a holder of preferred stock be personally liable for the debts of the corporation; but in case of insolvency its debts or other liabilities shall be paid in preference to the preferred stock; the terms "general stock" and "common stock" are synonymous.

12—McCarter v. Pitman, etc., Gas Co., 74 N. J. Eq. 255 (1908).

13—Corporation Act, § 25. See Benjamin v. Laffray, 75 Atl. 775 (1910).

14—Corporation Act, § 26.

After the issue of common stock by a railroad company, a supplement to its charter was passed, which authorized the issue of preferred stock, on the following conditions: "That when so issued and declared to be preferred stock, the holders thereof, respectively, shall be entitled to receive dividends on the same, not to exceed seven per centum per annum, before any dividend shall be set apart or paid on the other and ordinary stock of said company." In some years, dividends of seven per cent or less were declared on the preferred stock alone, and in other years, such dividends were declared on both the preferred and common stock. It was held that a holder of the preferred stock was not entitled to annual dividends thereon at a fixed rate, but only to dividends out of the annual profits, but when such profits had been earned, he was entitled to a dividend of seven per cent therefrom, before any dividend could be paid on the common stock.

"Calling stock 'preferred stock'" the court said "does not, *per se*, define the rights of such stock, but in order to determine in what respect the holder of such stock is to be preferred to the holder of ordinary stock, resort must be had to the statute or contract under which it is issued. * * * Where the statute or contract under which preferred stock is issued, declares or promises that the holder of such stock shall receive a dividend of a fixed and certain rate per annum, without limiting the annual sum to be paid as dividends to profits earned or made within a designated period—as, for example, that he shall receive a dividend of seven per cent per annum before any dividend shall be paid on the ordinary stock—there the preferred stockholder is entitled to seven per cent per annum from the date of the issuing of the stock held by him, whether profits sufficient to pay him each year are made or not; and if, at the first division of profits, sufficient shall not have been made to pay him the whole sum due, he may carry the arrears due him over to the next dividend, and continue to do so until he has received the whole sum due him, calculated at seven per cent per annum from the date of the issue of the stock held by him."¹

Mandamus will not lie to compel the redemption of preferred stock of a corporation issued in disregard of the statutory provisions even although all persons interested acquiesced in the unauthorized issue.²

"Occasionally a mortgage is given by the corporation to secure the payment of dividends on preferred stock and to give it a preference in payment over subsequent debts of the corporation upon insolvency or dissolution. It is difficult to see how such a mortgage would be legal unless it has been issued under express statutory authority."³

"In this case I think the position taken by the counsel for the de-

1—Elkins v. Camden & Atlantic R. R. Co., 36 N. J. Eq. 233 (1882). See also Bassett v. U. S. Cast Iron Pipe & Foundry Co., 74 N. J. Eq. 668 (1908).

2—Smith v. Ferracute Machine Co., 68 N. J. L. 237 (1902).

3—Cook on Corporations, § 271; quoted with approval in Black v. Hobart Trust Co., 64 N. J. Eq. 415 (1903).

fendants, namely, that the question in all cases is, are the parties actual stockholders, or are they creditors? is the true one. But I am of opinion that they cannot occupy both positions, of stockholders and secured creditors. In this case they have attempted to do so, under a statute which forbids them to occupy the position of secured creditors. Hence their case fails, and I shall advise a decree in favor of the complainant as prayed for in his bill." ⁴

32. INCREASE OF CAPITAL STOCK.

As to the mode of increasing the amount of the authorized capital stock see section 19 above.

Where it is alleged that the capital stock is to be increased for the purpose of issuing it for property worth less than the face value of the stock, the proceedings will be restrained at the instance of dissenting stockholders pending the determination by the court of the value of the property. "The fact that in making an increase of stock two-thirds of the stockholders have concurred with the board of directors, does not relieve their action from the rule that corporate bodies must keep within the legislative bounds of their authority, with respect to their ends as well as to their means. They cannot be justified in an attempt to increase the capital stock for an illegitimate object, e. g., to found a charity, or in order to issue the stock for less than par." ¹

Each stockholder in a corporation, all of whose capital stock has been issued, is entitled to share in any additional or new stock proposed to be issued in proportion to the amount of his present holdings in the existing issue upon the same terms that the new stock shall be issued to other parties. And it is held that an issue of bonds containing the privilege to their holder to convert the same into stock, amounts to an issue of stock and can only be issued subject to the right of each stockholder to share ratably therein.²

Where, however, new stock is issued for the purchase of property pursuant to the provisions of the statute, which will become a part of the common property from which all stockholders will receive the same benefit, original stockholders cannot insist that new stock shall be issued to them in the proportion their holdings bear to the whole amount of stock before the increase.³

Where a testator held stock in a corporation, which, after his death, increased its authorized capital stock and gave to the shareholders the right to subscribe to the increased issue, which rights were sold by the executors for substantial sums of money, it was held that the money

⁴—*Black v. Hobart Trust Co.*, 64 N. J. Eq. 415 (1903).

¹—*Donald v. American Smelting, etc., Co.*, 62 N. J. Eq. 729 (Court of Errors & Appeals, 1900).

²—*Wall v. Utah Copper Co.*, 70 N. J. Eq. 17 (1905).

³—*Meredith v. Zinc & Iron Co.*, 55 N. J. Eq. 211 (1897); affirmed 56 N. J. Eq. 454 (Court of Errors & Appeals, 1897).

realized from the sale of such rights became principal and did not go to life tenants.⁴

But where, at the same time the company declared a dividend, and provided that the right to subscribe to the new stock and the right to receive the dividend accrued simultaneously, and the executors paid for the stock with the dividends, the stock so purchased must be held to be a dividend as between life tenants and remaindermen.⁵

33. DECREASE OF CAPITAL STOCK.

The procedure incident to an amendment of the certificate of incorporation (see § 19 above) must be followed in the case of a decrease of the capital stock. The Corporation Act further provides (§ 29) that "the certificate decreasing the same shall be published for three weeks successively, at least once in each week, in a newspaper published in the county in which the principal office of the corporation is located; the first publication to be made within fifteen days after the filing of such certificate, and in default thereof the directors of the corporation shall be jointly and severally liable for all debts of the corporation contracted before the filing of the said certificate, and the stockholders shall also be liable for such sums as they may respectively receive of the amount so reduced; provided, no such decrease of capital stock shall release the liability of any stockholder, whose shares have not been fully paid, for debts of the corporation theretofore contracted, nor effect any reduction of the taxes that may be required to be paid by the charters of corporations incorporated by special acts."

The statutory provisions must be complied with to effect a reduction of the capital stock so as to authorize the corporation to deduct the amount of such stock from the total amount of stock issued and outstanding under the franchise tax act.¹

34. REDUCTION OF CAPITAL.

The Corporation Act (§ 29) provides six different ways in which stock may be retired by a vote of two-thirds in interest of each class of stockholders:

- (1) By retiring or reducing any class of stock.
- (2) By lot.
- (3) By surrender of shares and the issue of a less number of shares *pro rata*.
- (4) By the purchase, at not above par, of certain shares for retirement.
- (5) By retiring shares owned by the corporation.
- (6) By reducing the par value of shares.¹

4—Brown v. Brown, 72 N. J. Eq. 667 (1907).

5—Brown v. Brown, 72 N. J. Eq. 667 (1907).

1—Knickerbocker Importation Co. v. Board of Assessors, 74 N. J. L. 583 (Court of Errors & Appeals, 1907).

1—Berger v. U. S. Steel Corporation, 63 N. J. Eq. 809 (Court of Errors & Appeals, 1902).

The first two methods are compulsory; the fourth method is not compulsory, else it would not be a purchase. It cannot, therefore, be held that in order to give effect to this fourth method, shares must, in fact, be purchased ratably from each stockholder, and that one dissentient, although all others accept, may deprive the company of the benefit of this method and render the legislative act to that extent abortive.²

The act further provides (§ 30, as amended by P. L. 1904, p. 275) that the directors of a corporation shall not make dividends except from its surplus, or from the net profits arising from the business of such corporation, nor shall it divide, withdraw, or in any way pay to the stockholders or any of them any part of the capital stock of such corporation, or reduce its capital stock except as authorized by law; in case of any wilful or negligent violation of the provisions of this section, the directors under whose administration the same may have happened, except those who may have caused their dissent therefrom to be entered at large upon the minutes of such directors at the time, or who not then being present, shall have caused their dissent therefrom to be so entered upon learning of such action, shall jointly and severally be liable at any time within six years after paying such dividend, to the stockholders of such corporation, severally and respectively, to the full amount of any loss sustained by such stockholders, or in case of insolvency to the corporation or its receiver to the full amount of any loss sustained by the corporation, by reason of such withdrawal, division or reduction.

An act of 1902 (P. L. 1902, p. 217) provides that, with the consent of two-thirds in interest of each class of the stockholders present, in person or by proxy, at a meeting called in the manner provided in section 27, every corporation organized under the Corporation Act which—

(1) Shall have issued preferred stock entitling the holders thereof to receive dividends at a rate exceeding five per centum per annum;

(2) Shall have continuously declared and paid dividends at such rate on such preferred stock for the period of at least one year next preceding the meeting;

(3) Whose floating or unfunded debt at the time of the stockholders' meeting shall, in the certificate thereof filed with the secretary of state, be certified not to exceed ten per centum of the par amount of the preferred stock then outstanding;

(4) Whose assets at such time, after deducting the amount of its indebtedness, shall be certified, in the judgment of the officers making such certificate, to be at least equal to the amount of preferred stock issued and outstanding;

May, with the consent of the holder of any such preferred stock, redeem and retire the preferred stock of such holder, out of the bonds,

²—*Berger v. U. S. Steel Corporation*, 63 N. J. Eq. 809 (Court of Errors & Appeals, 1902).

or out of the proceeds of bonds, of the corporation, bearing interest at a rate not exceeding five per centum per annum, the principal of such bonds being made payable at a date not less than ten years from the date thereof; and that "every corporation organized under this act may, from time to time, in the manner above provided, issue bonds, which, if thereon so declared, shall be convertible at par, at the option of the holder, into fully-paid common stock of the corporation at par, within any period therein prescribed, not less than two years from the issue thereof; and, in such case, the board of directors may authorize the issue of common stock, into which such bonds, by their terms, shall be convertible."

Construing this act it was held by the Court of Errors and Appeals that where the certificate of incorporation of a company required the corporation to pay to the preferred stockholder a yearly dividend at the rate of seven per cent per annum in quarterly payments, and the meeting was held May 19th, 1902, and a dividend of one and three-quarters per cent was paid for the quarter ending July 1st, 1901, a like dividend for each of the quarters ending October 1st, 1901, January 1st, 1902 and April 1st, 1902, this was a compliance with the act.³

The court said: "The payment of dividends is to be for the period of one year, the dividends are to be paid out of surplus over and above the amount of the capital stock and outstanding indebtedness, and are to be made for the 'period.' When a dividend is made, it is made as a dividend for the period of three months then previously elapsed; a dividend for a future period has not been known in the business history of corporations."

The Corporation act gives express power to retire shares by purchase, and that provision must be read into the certificate of incorporation. Such purchase may be made on credit. "The right to purchase carries with it the right to make such terms as to payment as can be agreed upon with the vendor. The company could say to the seller that it would take the stock at the offered price, payable in one week or in one month, and it would be a valid transaction; and if a credit of one week or one month could be given, it could be extended at the will of the vendor. * * * The right to buy on credit, must necessarily include the right of the purchaser to give the vendor evidence of the credit, by note, or bond, or other way agreed upon, as well as the right of the purchaser to pledge his credit, by note or bond, to a third person, and thereby secure the cash to pay the vendor. The right to create a debt also carries with it the right to secure it by mortgage or otherwise, in the absence of any statutory restraint upon the corporation."⁴

Upon the reduction of the capital stock where the surplus thereby

3—U. S. Steel Corporation v. Hodge, 64 N. J. Eq. 807 (Court of Errors and Appeals, 1903).

4—Berger v. U. S. Steel Corporation, 63 N. J. Eq. 809 (Court of Errors and Appeals, 1902).

created is invested in the stock of other corporations, it is not necessary that it be reduced to cash before distribution to the stockholders, but the stock itself may be distributed.⁵

The corporation may distribute a portion of its assets and retain the balance as its property.⁶

Where a corporation was enjoined from voting stock which it held in competing railway companies as a part of its capital and assets or from declaring dividends on account thereof, thereby necessitating a reduction of its capital and a division of the surplus thereby created, and it was proposed to distribute the stock of the railway companies held as assets, it was held that every stockholder was entitled to his proportionate share of each class of the stock, where there is a possible difference in market value. It was further held, however, that a stockholder or his successor in interest, cannot enforce the return to him of the specific stock in the railway companies which he transferred to the corporation on the ground that the original transfer was void for illegality, since he was himself a conspirator.⁷

35. SUBSCRIPTIONS.

The execution of the certificate of incorporation constitutes an express contract to contribute to the capital stock.¹

Contracts to take stock in a corporation stand upon the same footing as all other conventional obligations. If induced by fraud, they create no obligation, and the injured party has a right to have them abrogated.² The subsection of contracts of this kind to the rule above stated is thus plainly expressed by Lord Romilly, in the case of *Central R. R. Co. of Venezuela v. Kisch*: "Contracts of this description between an individual and a company, so far as misrepresentation or suppression of the truth is concerned, are to be treated like the contracts between any two individuals. If one man makes a false statement which misleads another, the way in which that is to be treated affords the example for the way in which a contract is to be treated where a company makes a false statement which misleads an individual." And it is also held, that if a person is induced, without fraud,

5—*Continental Securities Co. v. Northern Securities Co.*, 66 N. J. Eq. 274 (1904).

6—*Continental Securities Co. v. Northern Securities Co.*, 66 N. J. Eq. 274 (1904).

7—*Continental Securities Co. v. Northern Securities Co.*, 66 N. J. Eq. 274 (1904).

1—*McCarter, Receiver, v. Ketcham*, 74 N. J. L. 825 (Court of Errors & Appeals, 1907).

2—*Vreeland v. N. J. Stone Co.*, 29 N. J. Eq. 188 (1878); affirmed 29 N. J. Eq. 651 (Court of Errors & Appeals, 1878); *Central R. R. Co. of Venezuela v. Kisch*, L. R. (2 H. L.) 99; *Smith's Case*, L. R. (2 Ch. Ap.) 604; *Kent v. Land & Brickmaking Co.*, L. R. (4 Eq. Cas.) 588; *Ross v. Estates Investment Co.*, L. R. (3 Eq. Cas.) 122, S. C. on appeal, L. R. (3 Ch. Ap.) 682; *Smith v. Reese River Co.*, L. R. (2 Eq. Cas.) 264.

to enter into a contract of this description by a promise, on behalf of the corporation, that it will aid him, in a specified mode, to pay his subscription, and the promise is not kept, his contract will not be enforced.³

On bill filed by the purchaser against the officers and the company to abrogate a subscription contract because of the fraud and for the restoration of the price paid, the company cannot retain the money paid and defend by denying that it authorized or knew of the fraudulent statements. To do full equity it must also return the money obtained by the fraud.⁴

The court said: "In the case in hand, whatever may have been the lack of authority of the president, secretary and treasurer of the defendant company to make the misrepresentations which led to the sale, or even to bargain for or issue its stocks, the fact is admitted that the company, on the bargain made by these officers (who probably comprise all the executive officers), accepted the payment and issued the stock. The company thereby ratified their action and conduct. When the company took the benefits of the fraud, it took with those benefits the responsibility for the fraud which procured them, at least to the extent of an obligation of restoration to the party defrauded. It is no answer to say it did not know of or authorize the fraudulent statements. It knows of them now, and by retaining the money with knowledge, it ratifies their acts and the statements by which the money was obtained. If it disavows the fraud it has not done full equity until it restores to the injured party the benefits which it received by reason of the fraud. It cannot, in a court of equity, in a case where the superior rights of the creditors of the company do not intervene, retain the profit resulting from a fraud done in its behalf, and refuse restoration upon an allegation of its ignorance of the fraudulent acts, or the lack of authority of its officers who acted for it in the conduct of its business in perpetrating the fraud. In this state, in just such a case, the rule is stated in the broadest terms. If such contracts are induced by fraud they create no obligation, and the injured party has a right to have them abrogated. (Citing *Vreeland v. N. J. Stone Co.*, 29 N. J. Eq. 189.)

"In that case the fraud by which the subscription was obtained consisted of a false representation made by a single director in the presence of other directors at a directors' meeting, but upon which no corporate action whatever was taken. The complainant was held to be entitled to have his contract of subscription abrogated and a decree for the return of his money, not only against the company, but also against all the directors who were present, and the Court of Errors and Appeals (29 N. J. Eq. 651) unanimously approved the decree."⁵

3—*Vreeland v. N. J. Stone Co.*, 29 N. J. Eq. 188 (1878); affirmed 29 N. J. Eq. 651 (Court of Errors & Appeals, 1878).

4—*Garrison v. Technic Electrical Works*, 55 N. J. Eq. 708 (1897).

5—*Garrison v. Technic Electrical Works*, 55 N. J. Eq. 708, 719 (1897).

A false statement by officers of a corporation on selling shares of its stock, that none of it had been sold for less than par, is a material misrepresentation authorizing rescission.⁶

Where an increase of the capital stock of a corporation is not legally effected in accordance with the provisions of the statute, a subscription for shares of such increased capital stock is void *ab initio*, for want of consideration.⁷

In *Eisenlord v. Oriental Insurance Co.*, 29 N. J. Eq. 437 (1878), it was held, that a stockholder who subscribed for his stock under an agreement with the secretary of the company that the company would "redeem" his stock at any time at par and ten per cent interest, and for payment assigned a mortgage with a collateral policy of insurance, payable, in case of loss, to the company, cannot, after loss and payment to them and the insolvency of the company, recover the amount from the insolvent company, as against bona fide stockholders and creditors; it appearing that the object of the transaction was to give the company credit before the public.

It is a general rule that it is an implied part of a contract for subscriptions that the contract is to be binding and enforceable against the subscriber only after the full capital stock has been subscribed. This rule is subject to the qualifications that parties may agree to commence business with a smaller subscription, but on the other hand, when a promoter induces subscriptions on the promise that in consideration of stock to be retained by him as a part of the plan, he will furnish subscriptions to stock for the benefit of the subscribers, that promise is a part of the consideration entering into the contract of subscription, and a default on the part of the promoter avoids the contract.⁸

An agreement that payment of part of the amount of subscriptions to the capital stock of a corporation shall be secured by mortgage, is void as against the creditors of the corporation.⁹

36. ASSESSMENTS AND CALLS ON SUBSCRIPTIONS.

The Corporation Act provides (§ 22) that the directors of every corporation may, from time to time, make assessments upon the shares of stock subscribed for, not exceeding, in the whole, the par value thereof; and the sums so assessed shall be paid to the treasurer at such times and by such instalments as the directors shall direct, said directors having given thirty days' notice of the assessment and of the time and place of payment either personally or by mail or by publication in a newspaper published in the county where the corporation is established.

6—*Hubbard v. International Mercantile Agency*, 68 N. J. Eq. 434 (1904); see also *Eggers v. Anderson*, 63 N. J. Eq. 264 (Court of Errors & Appeals, 1901).

7—*Grosse Isle Hotel Co. v. I'Anson's Exrs.*, 42 N. J. L. 10 (1880).

8—*Audenried v. East Coast Milling Co.*, 68 N. J. Eq. 450 (1904).

9—*Boney v. Williams*, 55 N. J. Eq. 691 (1897).

In *Grosse Isle Hotel Co. v. I'Anson's Exrs.*, 42 N. J. L. 10 (1880); affirmed 43 N. J. L. (Court of Errors and Appeals, 1881), the subscription agreement was as follows:

"We, the undersigned, for a valuable consideration, do hereby agree with the Grosse Isle Hotel Company, of Michigan, that we will become subscribers to the capital stock of the said Grosse Isle Hotel Company, and do hereby take the number of shares of said capital stock set opposite our respective names, and agree to pay all charges and assessments regularly levied or assessed by the board of directors, or other proper officers, under the articles of association of the said company, or of the by-laws or regulations now or hereafter to be passed for the government of said company."

It was held, that such a subscription imports a promise not to pay, at once for the whole sum subscribed, but to pay such assessments. Chief Justice Beasley said:

"Whether a subscription of this character would give rise, as a matter of law, to an implied promise to pay the designated value of such shares, is a question that has been frequently mooted, and presents a subject on which the authorities are at variance. But, with respect to this particular case, it appears to me that we need not enter this field of contention, inasmuch as we have decisions which should be considered as entirely authoritative, with respect to the rights of these parties, if we regard their contract in the light in which the counsel of the defense would have us accept it. The decisions to which I refer are to be found in the reports of the state of Michigan; and such decisions, I understand, expressly hold that a general subscription to the stock of one of these companies, organized, as the plaintiff has been, under the provisions of the statutes of that state, imports an agreement, not to pay at once the whole sum representing the value of the shares subscribed for, but a stipulation to pay such sum when called for by the directors, in amounts duly assessed." After citing the cases he continues: "These adjudications of the Supreme Court of Michigan seem to me to rest on the solid grounds of good sense, and, under the circumstances, should, I think, entirely control the present question."

Construing a statute similar to section 22 of the Corporation Act the Court of Errors and Appeals, in *Braddock v. Philadelphia, Marlton & Medford R. R. Co.*, 45 N. J. L. 363 (1883), held that a suit will not lie on a subscription of this kind before such a call has been made. The facts were as follows: Before the company had been organized, certain of the shareholders, assuming to act in the capacity of directors of the corporation, passed a resolution authorizing the president, secretary and treasurer to require the subscribers to the capital stock of the company to pay the amounts respectively subscribed in such amounts, and in such manner and in such instalments, as they might deem proper. It was held that this resolution was void, as it was passed in advance of the legal existence of the corporation. But at a

subsequent date, and after the due organization of the company, the directors passed a resolution directing the president to take such proceedings toward the collection of subscriptions as would "most speedily and surely accomplish the object." This was plainly a direction to the president to collect, not a part, but the whole of the moneys due from subscribers, and was, in substance, a call for the entire amount of the sums subscribed. A notification to a subscriber of this action of the board could have left him in no doubt on this subject. "It seems to me," said Chief Justice Beasley, "that it would be a useless refinement to hold that in addition to a direction to collect the sums due, the directors must add a statement that they call in such sums. A call is nothing more than an official declaration that the sums subscribed are required to be paid. A direction to collect such sums involves, necessarily, such a declaration."

The written instrument is the only competent evidence of the agreement, and its terms cannot be contradicted by parol proof that, at the time when it was signed, the understanding was, not that the subscriber should pay according to call, but without any call whatever. The fact that, notwithstanding the terms of the subscription, a subscriber paid the full price for part of the stock subscribed for, does not establish his liability to pay in like manner for the rest, and is not evidence of an agreement on his part to pay without call.¹

37. ACTIONS TO ENFORCE PAYMENT OF SUBSCRIPTIONS.

An action will lie for unpaid calls, and judgment therein should be for the balance remaining unpaid, with interest upon the several installments, from the times they respectively became due and were directed to be paid.¹

In *Perdicaris ads. Trenton City Bridge Company*, 29 N. J. L. 367 (1862), it was held that the declaration should set out the act of incorporation, and that it was not sufficient to state the agreement to be to pay the amount claimed according to the provisions of the charter of the company.

Common counts, setting forth that the defendant is indebted to the plaintiff in a certain sum for the unpaid instalments on a specified number of shares of the capital stock of the plaintiff before that time subscribed by him, and in a further certain sum for the capital stock of the said plaintiff before that time subscribed for and taken by him, are insufficient, they evidently being founded on an executory contract. There cannot be a recovery on the common count for goods sold and delivered, unless the agreement is complete by an absolute delivery. If anything remains to be done to complete the sale, and vest the property in the vendee, the action must be brought on the special contract.²

1—*Grosse Isle Hotel Co. v. P'Anson's Exrs.*, 43 N. J. L. 442 (Court of Errors & Appeals, 1881).

1—*Bordentown, etc., Turnpike Co. v. Imlay*, 4 N. J. L. 327 (1818).

2—*Perdicaris ads. Trenton City Bridge Co.*, 29 N. J. L. 367 (1862).

In an action upon a call the plaintiff proved that the notice of assessment was duly mailed, and in answer to this the defendant testified that he did not remember the receipt of such notice. The question whether such notice was in point of fact made out, and was received by the plaintiff in error, was submitted for the decision of the jury. The court said: "No other course could have been properly taken. Whatever doubts may at one time have existed on the subject, it is now the established rule that a presumption will arise that a paper duly mailed and addressed will reach its destination, and such presumption will not be overcome, as a matter of law, by testimony to the effect that the person to whom such instrument was sent does not remember that it came to his hands. Indeed, if he absolutely testifies that such paper so transmitted was not received by him, the question so presented would still be one of fact and not of law."³

The statute of limitations begins to run from the time call is made.⁴

In *Knickerbocker Trust Co. v. Carhart*, 71 N. J. Eq. 495 (1906), it was held that where defendant, just prior to the maturity of an underwriting obligation made by him, conveyed all of his real estate to his wife, leaving him unable to pay a judgment recovered by complainant on such undertaking, such facts were sufficient to establish a *prima facie* case that the conveyance to the wife was fraudulent.

Where the certificate of incorporation of a company formed under the general corporation act provided that the holders of record at the time of making an assessment or call should be liable therefor, it was held that an action would lie in behalf of a receiver in insolvency proceedings against such holder to recover the amount of a call, although such holder was not the original subscriber and had before the call was made sold and transferred his stock, and delivered the certificate therefor, properly assigned to the purchaser, and had given the company notice thereof. To a plea setting up such facts the plaintiff demurred and the demurrer was sustained.⁵

Where, in a suit to wind up the affairs of an insolvent corporation, an assessment has been ordered by the court to be made upon unpaid subscriptions, an action at law may be brought against a stockholder to collect his quota.⁶

And where a stockholder has had notice of the insolvency proceedings and an action at law is brought by the receiver to collect the assessment made by order of the Court in the insolvency proceedings, he cannot in such action question the propriety or validity of such assessment.⁷

3—*Braddock v. Philadelphia, Marlton & Medford R. R. Co.*, 45 N. J. L. 363 (1883).

4—*McCarter v. Ketcham*, 72 N. J. L. 247 (Court of Errors & Appeals, 1905).

5—*Brown, Receiver, v. Morton*, 71 N. J. L. 26 (1904).

6—*Clevenger v. Moore*, 71 N. J. L. 148 (1904).

7—*Clevenger v. Moore*, 71 N. J. L. 148 (1904); *Hood v. McNaughton*, 54 N. J. L. 425 (1892); *Hawkins v. Glenn*, 105 U. S. 319; *Cumberland Lumber*

Where the defendant pleads that the power to cancel a subscription for stock is derived from the original agreement between the parties, and has been exercised, the plaintiff cannot reply by the general traverse *de injuria*.^s

38. FORFEITURE AND SALE OF SHARES FOR NON-PAYMENT OF CALLS.

The Corporation Act provides (§ 23) that if the owner of any shares shall neglect to pay any sum assessed thereon for thirty days after the time appointed for payment, the treasurer, when ordered by the board of directors, shall sell, at public auction, such number of the shares of the delinquent owner as will pay all assessments then due from him, with interest, and all necessary incidental charges, and shall transfer the shares sold to the purchaser, who shall be entitled to a certificate therefor.

The act further provides (§ 24) that the treasurer shall give notice of the time and place appointed for the sale, and of the sum due on each share, by advertising the same three weeks successively, once in each week, before the sale, in some newspaper published in the county where the corporation is established, and by mailing a notice thereof to the delinquent stockholder, if he knows his post-office address.

If installments are called for and not paid according to the charter the shares on which there is a delinquency are liable to forfeiture. The purpose of the directors in making the call will not be investigated by the court.¹

The board of directors of a company cannot forfeit stock once rightly issued for the non-compliance of the owner with a contract for the consideration of which it was issued, nor in any other way, except the mode provided by the statute.²

39. CERTIFICATES OF STOCK.

Every stockholder shall have a certificate, signed by the president and treasurer, certifying the number of shares owned by him in such corporation.¹

A certificate of the number of shares subscribed for, or to which the subscriber is entitled, is not necessary to constitute the subscriber a shareholder, or to impose upon him a liability to pay the amount of his subscription. The certificate is merely an additional and convenient evidence of his ownership of stock which he may require for his own satisfaction, or to enable him to effect a transfer of his interest. A subscriber for stock who has complied with the terms of his sub-

Co. v. Clinton Hill Manufacturing Co., 57 N. J. Eq. 627 (Court of Errors & Appeals, 1899).

8—Ruckman ads. Ridgfield Park R. R. Co., 38 N. J. L. 98 (1875).

1—McNeely v. Woodruff, 13 N. J. L. 352, 357 (1833).

2—Downing v. Potts, 23 N. J. L. 66 (1851).

1—Corporation Act, § 19.

scription, and has paid the assessments on the shares subscribed for, may compel the corporation to give him a certificate by proceedings at law.²

Irregularity in the execution of the certificate (for example, the signing of the certificate by the secretary instead of the treasurer) does not relieve the defendant from responsibility as a shareholder.³

The holding of the certificate creates a legal presumption of rightful ownership, which can only be overcome by proof that it was illegally issued or legally forfeited. If alleged to be illegally or fraudulently issued, the burden of proof is upon the party making the allegation.⁴

By commercial usage, sanctioned by repeated adjudications in our courts as well as in those of other states, a certificate of stock accompanied by an irrevocable power of attorney, either filled up or in blank, is, in the hands of a third party, presumptive evidence of ownership in the holder, and where the party in whose hands the certificate is found is a holder for value, without notice of any intervening equity, his title cannot be impeached. The holder of the certificate may fill up the letter of attorney, execute the power, and thus obtain the legal title to the stock. And such a power is not limited to the person to whom it was first delivered, but enures to the benefit of each bona fide holder into whose hands the certificate and power may pass; and the title of the holder is in nowise affected by a provision in the charter or by-laws of the corporation, that the stock is transferable only on the books of the corporation. Such provision is intended merely for the protection and benefit of the corporation.⁵

The duties of the president and treasurer respectively with reference to the execution and delivery of stock certificates, are purely clerical or ministerial.⁶

As between the company and the original holder the certificate is a mere voucher, a mere receipt establishing when regularly issued, a prima facie title in the holder to the shares of stock named therein. It is the ownership of the stock which is to be decided, and the possession of the stock certificate is a mere incident.⁷

The right of ownership may be determined in an interpleader suit. "I do not think that the unauthorized act of the defendant in issuing the stock to himself in the slightest degree affected the power of the corporation to protect itself by an interpleader suit. There might be

2—Storage Company v. Assessors, 56 N. J. L. 389 (1894).

3—Clevenger v. Moore, 71 N. J. L. 148 (1904); N. Y. & East. Tel., etc., Co. v. Great East. Tel. Co., 74 N. J. Eq. 221 (1908); affirmed 72 Atl. 1119.

4—Downing v. Potts, 23 N. J. L. 66 (1851).

5—Mount Holley, etc., Company v. Ferree, 17 N. J. Eq. 117 (1864); Rogers v. N. J. Insurance Co., 8 N. J. Eq. 167 (1849); Broadway Bank v. McElrath, 13 N. J. Eq. 24 (1860); affirmed sub nom. Hunterdon County Bank v. The Nassau Bank, 17 N. J. Eq. 496 (Court of Errors & Appeals, 1864); Prall v. Tilt, 28 N. J. Eq. 479 (Court of Errors & Appeals, 1877).

6—Lakewood Gas Co. v. Smith, 62 N. J. Eq. 677 (1902).

7—Lakewood Gas Co. v. Smith, 62 N. J. Eq. 677 (1902). See also Bijur v. Standard Distilling & Distributing Co., 74 N. J. Eq. 546 (1908).

many unauthorized certificates for the same stock outstanding in the hands of different claimants, and as many more claimants without certificates. I can perceive no reason in such a case why the corporation should not make all the claimants, both those holding certificates and those without certificates, defendants to a bill in the nature of a bill of interpleader, holding the certificates within the power of the court by a preliminary injunction such as was issued in this case."⁸

Ordinarily mandamus will not lie to compel the corporation to issue certificates of stock, as there is an adequate remedy in an action for damages.⁹

As to the statutory procedure to compel the issue of a new certificate in lieu of a lost or destroyed certificate, see Part II of this book.

40. ASSIGNMENT AND TRANSFER OF SHARES OF STOCK.

The shares of stock in every corporation shall be personal property, and shall be transferable on the books of the corporation in such manner and under such regulations as the by-laws provide, and whenever any transfer of shares shall be made for collateral security, and not absolutely, it shall be so expressed in the entry of the transfer.¹

"The practice of keeping books to record the transfer of stock was adopted by the East India Company, perhaps from its inception, and transfer on the books was regarded as essential for passing the title. Provision, therefor, was customarily inserted in early charters. Therefore, one of the earliest well recognized rights of shareholders was to have his name kept upon the transfer book so long as he held stock, and in consequence of the assignability of shares, to have the name of his assignee substituted, if he parts with his interest."²

Where it is provided, by the charter or by-laws, that stock shall be transferred only upon the books of the corporation, there is a decided weight of authority in support of the position that a *bona fide* transfer, by delivery of the certificate, is, nevertheless, valid as between vendor and vendee, that the equitable title passes by such transfer, and that the claim of the vendee is good in equity against the claim of an execution or attaching creditor of the vendor. Such provision, whether by charter or by law, is regarded as designed to protect the interests of the corporation, and as applying solely to the relation between the corporation and its stockholders. Its only office is held to be equivalent to that of the provision contained in some special charters "to afford evidence of the ownership of the stock, in all elections and

8—Lakewood Gas Co. v. Smith, 62 N. J. Eq. 677 (1902). See also N. Y. & East. Tel., etc., Co. v. Great East. Tel. Co., 74 N. J. Eq. 221 (1908); affirmed 72 Atl. 1119.

9—Morton v. Timken, 48 N. J. L. 87 (1886); Galbraith v. Building Association, 43 N. J. L. 389 (1881).

1—Corporation Act, § 20.

2—Professor Williston in Select Essays in Anglo-American Legal History, Vol. III, p. 223.

other matters submitted to the decision of the corporation," including all questions as to the ownership of the stock as between the corporation and its members.³

In *McCourry* against *Doremus*, 10 N. J. L. 245 (1828), it was held that where the charter of a corporation provided that all the shares of its capital stock shall be transferrable on the books of the company in such manner as the by-laws shall ordain, no legal transfer could be made until the corporation provided books and ordained by-laws for the transfer of its stock, and that until then no legal demand on a person to transfer shares could be made.

It is settled that one in possession of a certificate of stock in an incorporated company, accompanied by an assignment in blank, executed by the record owner, with an irrevocable power of attorney, authorizing the transfer of the stock, is presumptively the equitable owner of the shares, whose title thereto cannot be impeached if he has given value for them without notice of any intervening equity.⁴

The reason of the rule is, that the record owner has done everything in his power to effect the transfer, and by such act has assigned all interest he may have had, and surrendered all indicia of ownership—as to third parties, holders for value, he is estopped from asserting ownership—as to volunteers the gift is complete and irrevocable if *inter vivos*.⁵

The general rule, as stated in *Cook on Corporations*, § 369, is that the rights and equities of all holders of stock back of the registry and issue of the certificates in existence are not allowed to affect the stockholdership or rights of purchasers of these new certificates. "It is true," he further says, (at § 443), with reference to certificates which have been stolen or misappropriated and the endorsement forged, that "the person who obtains registry first, after the illegal act has been done, is not protected" by the rule stated. "This exception, I take it, is founded on the fact that the person who so obtains registry has had possession of the certificate and forged endorsement, and has thus been put on inquiry as to whether it is genuine, and has used it without such inquiry, and still holds the fruit of the fraud effected by the forgery."⁶

"In case of refusal by the officers of a company to transfer on the

3—*Broadway Bank v. McElrath*, 13 N. J. Eq. 24 (1860); affirmed sub nom. *Hunterdon Co. Bank v. Nassau Bank*, 17 N. J. Eq. 496 (Court of Errors & Appeals, 1864).

4—*Rogers v. New Jersey Insurance Co.*, 8 N. J. Eq. 167 (1849); *Broadway Bank v. McElrath*, 13 N. J. Eq. 24 (1860); affirmed in *Hunterdon County Bank v. Nassau Bank*, 17 N. J. Eq. 496 (Court of Errors & Appeals, 1864); *Mount Holly Co. v. Ferree*, 17 N. J. Eq. 117 (1864); *Prall v. Tilt*, 28 N. J. Eq. 479 (Court of Errors & Appeals, 1877); *Del. & Atl. R. R. v. Irick*, 23 N. J. L. 321 (1852); *State, Bush, v. Warren F. Co.*, 32 N. J. L. 439 (1868).

5—*Matthews v. Hoagland*, 48 N. J. Eq. 455 (1891).

6—*Scarlett & Scarlett v. Ward*, 52 N. J. Eq. 197 (1893).

books at the request of the owner of stock, the proper remedy was not wholly clear in the Eighteenth Century. In the case of *King v. Douglass* (2 Doug. 524) an application was made for a mandamus to compel a transfer. Lord Mansfield refused to allow this extraordinary remedy, and suggested a special action of assumpsit and probably that action would have been held proper. Whether specific performance of the obligation would be enforced by equity was not suggested, but it is not unlikely that such a remedy would have been allowed."⁷

The rule that a special action of assumpsit is the remedy on the refusal of the corporation to transfer stock at the request of the owner, has been declared by the Supreme Court of this state.⁸

In *Galbraith v. Bldg. Assn.*, 43 N. J. L., 389, (1881), it was held that the purchaser of shares in a building and loan association was not entitled to a mandamus to compel the association to transfer them to him on the corporate books, on the ground that he had an adequate remedy in a suit for damages. The Court quoted with approval the following from *High on Extraordinary Remedies*, § 313: "In conformity with the general principle that mandamus will not lie where other adequate and specific remedy may be had at law, the Courts refuse to lend their interference by this extraordinary writ, for the purpose of compelling the transfer to a purchaser of shares of capital stock upon the books of an incorporated company, or to compel a company to issue certificates of stock." The court said: "The rule that mandamus will be allowed only in those cases where there is no other specific legal remedy, has been applied with equal stringency in this state."⁹

And in another case it was held that a mandamus commanding a corporation to transfer certain shares of its stock to a person who purchased them at a sale made by auditors in attachment, will not be awarded, if the stock has been regularly transferred and new certificates issued to a person presenting a *prima facie* title, before the attachment issued, although it be shown that there is reason to doubt whether the transfer was not made to defraud creditors. The court said that under such circumstances a suit at law, or a bill in equity, is the appropriate remedy.¹⁰

In *Young v. Vough*, 23 N. J. Eq. 325 (1873), affirmed 24 N. J. Eq. 535 (Court of Errors & Appeals, 1873), it was held, that a by-law of a national bank declaring that the debts of a stockholder shall be a lien on his stock, and that he shall not transfer it until such debt is paid, was a reasonable and legal by-law. In that case, however, the transferee of the stock had notice of such by-law.

7—Professor Williston in *Select Essays in Anglo-American Legal History*, Vol. III, p. 224.

8—*Jackson's Adm'r's v. Newark Plankroad Co.*, 31 N. J. L. 277 (1865).

9—See also *State v. Holiday*, 8 N. J. L. 205 (1825); *Morgan v. Monmouth Plank Road*, 26 N. J. L. 99 (1856).

10—*State, Bush, v. Warren Foundry & Machine Co.*, 32 N. J. L. 439 (1868).

41. TRANSMISSION OF SHARES UPON DEATH, ETC., OF HOLDER; TRUSTS IN SHARES OF STOCK.

Where a testator bequeaths stocks and bonds which pass into the possession of the executors and trustees of his will, the executors and trustees, if continuing to hold the same in the exercise of good faith, will be protected from any loss by virtue of P. L. 1899, page 236, providing that, when bonds and stocks come into the hands of executors or trustees under the will of a testator holding them, they shall not be accountable for any loss by reason of continuing to hold them, provided they exercise good faith and reasonable discretion.¹

The legal title to shares of stock vests in the executors from and after the probate of the will; and although they hold such title in *autre droit*, they have as complete a *jus disponendi* as if the shares were their own proper goods, and their sale and assignment of them to *bona fide* purchasers vests in such purchasers an absolute title.²

Where certificates of stock stood in the name of a testator, the transfer and receipt of the stock is conclusive proof that pledgees thereof knew that such stock belonged to the estate, and it is their duty under the circumstances, to ascertain whether the executrix had the right to transfer the stock as proposed; and, if such duty was disregarded, they cannot claim protection on the ground of *bona fides* and ignorance.³

Mere knowledge on the part of a purchaser that an executor or administrator is dealing with the assets in a fiduciary capacity, is not enough to raise suspicion, or to put the party on inquiry, for the reason that it is their primary duty to dispose of the assets, and settle the estate. A sale and transfer by them is ordinarily in the line of their duty. The common duty of a trustee, however, is not administration or sale, but custody and management for his *cestui que trust*.⁴

Accordingly one who lends money on the pledge of stock held in trust, will be held to have had notice that the trustee was abusing his trust and applying the money lent to his own purposes, when the certificates of the stock pledged show on their face that the stock is held in trust (though the name of the *cestui que trust* does not appear), and when the loan was apparently for the private purposes of the borrower, and that fact would have been revealed by inquiry. When the certificate of stock on its face reveals a trust, the duty of inquiry is devolved on one who lends money on the pledge thereof.⁵

"The effect of the word 'trustee' alone is the same. It means trustee for someone whose name is not disclosed; and there is no greater

1—Brown v. Brown, 72 N. J. Eq. 667 (1907); see also Coddington v. Stone, 36 N. J. Eq. 361 (1883); Parker v. Glover, 42 N. J. Eq. 559 (1887).

2—Keen v. James, 39 N. J. Eq. 527 (Court of Errors & Appeals, 1885).

3—Prall v. Hamll, 28 N. J. Eq. 66 (1877).

4—Prall v. Tilt, 28 N. J. Eq. 479 (Court of Errors & Appeals, 1877); Gaston v. American Exchange National Bank, 29 N. J. Eq. 98 (1878).

5—Gaston v. American Exchange National Bank, 29 N. J. Eq. 98 (1878).

reason for assuming that a trustee is authorized to pledge for his own debts the property of an unnamed *cestui que trust*, than the property of one whose name is known." 6

Where an executrix, who was life tenant of certain stock of the estate, assigned it as collateral security for the debt of some of the remaindermen it was held to be abuse of the trust. 7

A parol declaration of trust of shares of stock is valid. 8

The statute of frauds requiring declarations of trust to be in writing does not extend to trusts of personalty. 9

To make a legacy of stocks or securities specific, there must be something upon the face of the will to individualize and to distinguish them from all others of the same kind. Thus the legacy may be rendered specific by the use of the term "*my*" stock, or the stock, or part of the stock now "*in my possession*," or "*standing in my name*," or "*owned by me*," or by directing it to be sold and converted into money, or by any other form of expression which clearly indicates the purpose of the testator to give the specific thing, and not to designate the quantity or species of the thing bequeathed. 10

A foreign executor or administrator may transfer stock standing in the name of his testator or intestate. 11

The Transfer Tax Act (P. L. 1909, c. 228, § 12) provides that:

If a foreign executor, administrator or trustee shall assign or transfer any stock or obligations in this State standing in the name of a decedent or standing in the joint names of such decedent and one or more persons, or in trust for a decedent, liable to any such tax, the tax shall be paid to the State Treasurer on the transfer thereof. No corporation of this state shall transfer any such stock unless notice of the time of such intended transfer be served upon the Comptroller of the Treasury of this state at least ten days prior to such transfer, nor until said Comptroller shall consent thereto in writing; any corporation making such a transfer without the first obtaining the consent of the Comptroller of the Treasury as aforesaid shall be liable for the amount of any tax which may thereafter be assessed on account of the transfer of such stock, together with the interest thereon, and in addition thereto a penalty of one thousand dollars, which liability for such tax and interest and said penalty herein prescribed may be enforced in an action of debt in the name of the state of New Jersey.

On the transfer of property in this state of a non-resident decedent, if all or any part of the estate of such decedent, wherever situated, shall pass to persons or corporations who would have been taxable under this

6—*Gaston v. American Exchange National Bank*, 29 N. J. Eq. 98 (1878).

7—*Prall v. Hamil*, 28 N. J. Eq. 66 (1877).

8—*Pitney v. Bolton*, 45 N. J. Eq. 639 (1889).

9—*Kimball v. Morton*, 5 N. J. Eq. 26 (1845).

10—*Norris v. Ex'rs of Thomson*, 16 N. J. Eq. 218 (1863); *Norris v. Ex'rs of Thomson*, 15 N. J. Eq. 493 (Court of Errors & Appeals, 1863); *Norris v. Ex'rs of Thomson*, 16 N. J. Eq. 542 (Court of Errors & Appeals, 1863).

11—*In re Election of Cape May, etc., Co.*, 51 N. J. L. 78 (1888).

act, if such decedent had been a resident of this state such property located within this state shall be subject to a tax, which said tax shall bear the same ratio to the entire tax which the said estate of such decedent would have been subject to under this act if such non-resident decedent had been a resident of this state, as such property located in this state, bears to the entire estate of such non-resident decedent, wherever situated; *provided*, that nothing in this clause contained shall apply to any specific bequest or devise of property in this state.

42. SALES OF SHARES OF STOCK.

The rule of *caveat emptor* applies as well to the sale of stocks as of chattels. The vendor can only be made liable for misrepresentation or fraud.¹

A parol agreement to sell and assign shares of stock is a contract for the sale of goods, wares and merchandise within the sixth section of the statute of frauds.²

Courts of equity will not, in general, decree performance of a contract for the sale of stock or goods, inasmuch as with the same money, either not paid, as in agreements to deliver goods on receiving the price agreed on, where the party agreeing to deliver fails to do so on tender of the money, or recovered in damages where the money has been paid, the same quantity of stock or goods may ordinarily be purchased. But there are exceptions to the rule, and the Supreme Court of the United States seem inclined to give relief in equity by a specific performance on contracts respecting personalty, to a greater extent than that to which the court of Chancery in England has yet gone.³

A promise to transfer stock made for a bygone consideration, and not for a present or future consideration, will not be enforced in equity, inasmuch as equity only compels the performance of contracts based on valuable consideration, and the rule is that a bygone consideration cannot be made a good consideration for a promise.⁴

In a leading case on this subject Depue, J., said:

"There is a distinction between relief, either affirmative or defensive, in courts of equity, on the ground of fraud, and the remedy for fraud in a court of law. Courts of equity grant affirmative relief by way of reformation or cancellation of instruments, and even defensive relief in proceedings to enforce an obligation or liability, on the ground of constructive fraud, such as would afford no relief in law, especially by action for deceit. *Reese River Silver Mining Co v. Smith*, L. R., 4 H. of L. Cas. 64, in which Lord Cairns held that "if persons make assertions of facts of which they are ignorant, whether such assertions are

1—*Renton v. Maryott*, 21 N. J. Eq. 123 (1870).

2—*Greenwood v. Law*, 55 N. J. L. 168 (Court of Errors & Appeals, 1892).

3—*Kimball v. Morton*, 5 N. J. Eq. 26 (1845); citing 5 Wheat. 151, 1 Pet. 305. Where the stock is not procurable in the market and its pecuniary value is not readily ascertainable specific performance will, as a rule, be decreed. *Safford v. Barber*, 74 N. J. Eq. 353 (1908).

4—*Andrews v. Guayaquil & Quito Railroad Co.*, 73 N. J. Eq. 150 (1907).

true or untrue, they become, in a civil point of view, as responsible as if they had asserted that which they knew to be untrue," is an instance of equitable relief by way of rescission. The bill was filed by a subscriber for stock to be relieved from a subscription induced by false representations as to the property of the corporation. In that case, as appears in the report of L. R., 2 Ch. App. 604, the directors issued the prospectus containing the false statement on the faith of representations of the vendor of the property and without any knowledge of their untruth, and a subscriber for stock, who, was misled by the representations, was relieved in equity from his subscription. The doctrine of equitable estoppel, or estoppel *in pais*, which has been adopted by courts of law from the courts of equity, also presents considerations which do not apply to an action for deceit. The theory on which that doctrine is founded is that a party should not be allowed to retract an admission or affirmation which was intended to influence the conduct of another, if the retraction would materially injure the latter. The cases which hold that an agent who, without competent authority, induces another to contract with him as the agent of a third party, is liable in damages without regard to his moral innocence in the supposition that he had the authority he assumed to have, also rest on a special ground—on the ground of an implied warranty of authority. The observation of Lord Hatherly that "if a man misrepresents a fact, to that fact he is bound if any other person, misled by such misrepresentation, acts upon it and thereby suffers damage," was made with respect to cases of this kind. *Beattie v. Lord Ebury*, L. R., 7 H. of L. Cas. 102, 130. The action of deceit, to recover damages for a false and fraudulent representation, differs in principle from the cases that have been referred to. In such an action a false representation, without a fraudulent design, is insufficient. There must be moral fraud in the misrepresentation to support the action."⁵

In actions of deceit, based upon fraudulent representations in the sale of stock, the true rule of damages is that the wrong-doer must answer for those results injurious to the other party, which should be presumed to have been within his contemplation at the time of the commission of the fraud.⁶

"We think it clear in the present case,"⁷ said the Court of Errors and Appeals, "that the defendant must have excepted when he made his

5—*Cowley v. Smyth*, 46 N. J. L. 380 (1884). As to the right of a purchaser upon rescinding a contract of sale into which he has been lead by a fraudulent misrepresentation of another than the vendor to recover from the innocent vendor the purchase price received by him, see *Kennedy v. McKay*, 43 N. J. L. 288 (1881); *Titus & Scudder v. C. & F. R. R. Co.*, 46 N. J. L. 393 (1884); *White v. New York, Susquehanna and Western Railroad Co.*, 68 N. J. L. 123 (1902); *Brounfield v. Denton*, 72 N. J. L. 235 (Court of Errors & Appeals, 1905).

6—*Smith v. Duffy*, 57 N. J. L. 679 (Court of Errors & Appeals, 1895); *Crater v. Binninger*, 33 N. J. L. 513 (Court of Errors & Appeals, 1869).

7—*Smith v. Duffy*, 57 N. J. L. 679 (Court of Errors & Appeals, 1895).

fraudulent representation, that the plaintiff would probably retain the stock so long as he believed the representation to be true. The plaintiff did so retain it until the company failed, and during all that time the deceit practiced upon him was effective in controlling his conduct. The loss, therefore, actually resulting from the fraud, and which must be presumed to have been within the contemplation of the defendant, was the difference between the plaintiff's investment and the value of the stock after the fraud ceased to be operative,—that is, after the failure of the company. In the ascertainment of this difference, the market price of the stock at the time of the sale, or during the year succeeding, or at any time before the failure, was of no importance." The facts were as follows: In May, 1891, the plaintiff bought at par from the defendant, ten shares of the capital stock of a Pennsylvania corporation which had been organized by the defendant and others. The purchase was induced by a statement made by the defendant to the plaintiff that the company owned mines in Pennsylvania, for which, it had paid \$400,000 in cash. This statement was false and fraudulent. The plaintiff purchased the stock as an investment and, confiding in the truth of the statement, retained the stock until the company failed, early in the year 1893.

In an action for deceit, a false representation without a fraudulent design is insufficient; there must be moral fraud in the misrepresentation to support the action. Where the proof is that the representation was false to the defendant's knowledge, the *scienter* as well as the falsehood being proved, the proof of a fraudulent intent is regarded as conclusive. Evidence that the defendant intended no fraud will not be received, and the jury will be instructed to find for the plaintiff, though they should be of opinion that the defendant was not instigated by a corrupt motive of gain for himself, or by a malicious motive of injury to the plaintiff. Where the representation was untrue, but was not false to the defendant's knowledge, and he has added to his representation an affirmation that he made the representation as of his own knowledge, the force and effect of the evidence will depend, in a great measure, on the nature of the subject matter concerning which the representation was made. If such a representation be with respect to a specific fact or facts susceptible of exact knowledge, and the subject matter be such that the affirmation of knowledge is to be taken in its strict sense, and not merely as a strong expression of belief, the falsehood of the representation is in the defendant's affirmation that he had sufficient knowledge to vouch for the truth of his assertions, and that being untrue, the falsehood would be wilful, and therefore fraudulent. But where the representation is concerning a condition of affairs not susceptible of exact knowledge, such as representations with respect to the credit and solvency of a third person, or the condition and solvency of a financial institution, the assertion of knowledge is to be taken as meaning no other than a strong belief founded upon what appeared to the defendant to be reasonable and certain grounds. In such a case the question is wholly one of good

faith: the defendant may avail himself of any evidence which may tend to show good faith and probable grounds for his belief; and the question for the jury will be whether his conduct was *bona fide* and he honestly believed that his representation was true.⁸

In an action for the recovery of money paid for certain shares of stock purchased by plaintiff of defendant, the contract having been rescinded by plaintiff for alleged fraud on the part of the defendant, the question whether the shares of stock in question were sold by defendant to plaintiff, whether the contract of purchase had been affirmed by the plaintiff and whether plaintiff had rescinded with due promptness after discovery of the fraud, are questions for the jury.⁹

If a vendor of stock conceals from the vendee some fact which is material to the interest of the vendee, which is within the knowledge of the vendor, and which it is his duty to disclose, the concealment is fraudulent, and vitiates the sale. A duty to disclose exists when it expressly appears, by the language of the parties, or is necessarily implied from the circumstances of the case, that one party is actually reposing trust and confidence in the other, and the latter knows it. And when a vendor, before and without reference to any sale, has published false statements touching the value of stock, and in the negotiations for sale he is apprised that the vendee has heard those statements and is relying on their truth in making his purchase, and has no available means of ascertaining their falsity, silence on the part of the vendor is a fraudulent concealment vitiating the sale. Thus, it was held that when a sale of bank stock, belonging to an estate, was effected by one of three executors through a fraudulent concealment, the vendee could rescind the sale, and was entitled to a decree against all the executors for reimbursement out of the estate, not only of the purchase price, but also of any assessments upon the stock which he had been legally compelled to pay as shareholder.¹⁰

Contracts for speculations in stocks upon margins, when the broker and the customer do not contemplate or intend that the stock purchased or sold shall become or be treated as the stock of the customer, but the real transaction is a mere dealing in the differences between prices, that is, in the payment of future profits or losses, as the event may be, are contracts of wager, dependent on a chance or casualty. Such contracts, if made in this state, are unlawful, and securities given therefor are void by force of the provisions of the "Act to Prevent Gaming" (General Statutes, p. 1606).¹¹

An arrangement between customer and brokers for *bona fide* contracts for purchase and sale of stock by the brokers with third persons,

8—Cowley v. Smyth, 46 N. J. L. 380 (1884).

9—Shreve v. Crosby, 72 N. J. L. 491 (Court of Errors and Appeals, 1906).

10—Keen v. James, 39 N. J. Eq. 527 (Court of Errors & Appeals, 1885).

11—Flagg v. Baldwin, 38 N. J. Eq. 219 (Court of Errors & Appeals, 1884); Van Pelt v. Schauble, 68 N. J. L. 638 (1903).

does not become a wagering contract unless there is a further agreement or understanding between the brokers and customer that the *bona fide* deliveries contemplated between the broker and the third persons are not to be carried into effect between the brokers and their customer, and that, as between them, there is to be no other liability on either side than settlement of differences.¹²

A contract of this kind, when proved to exist, is a gaming contract, and securities given to the broker to secure the payment by the customer of the differences arising from the purchases and sales with third persons by the broker, cannot be enforced.¹³

The burden of proof that there was such further understanding or contract between the customer and broker, to control or render invalid the reciprocal obligations arising between them on the making by the broker of the actual contracts with third persons, on behalf of the customer, is upon the person asserting the illegality.¹⁴

In determining whether the transactions in stocks are lawful or merely gaming transactions, the fact that the transactions between the broker and those of whom he bought or to whom he sold are real, is not decisive, but the question is whether as between broker and customer, the dealings are really dealings in differences.¹⁵

A bill cannot be maintained under section 5 of the "Act to Prevent Gaming" which seeks a decree requiring defendants to transfer to complainant certain shares of stock which he had transferred and delivered to them in a transaction claimed to be unlawful under the Act, where the bill was not filed until after the lapse of six months from the time of the delivery of the shares to the defendants. Nor will such a bill lie under section 2 of the Act where it discloses that complainant has a complete remedy at law and shows no ground for equitable relief.¹⁶

The distinction between sales of stock by executors and administrators, and such sales by trustees, is that a sale and transfer by the former is ordinarily in the line of their duty. On the other hand, the common duty of a trustee is not administration or sale, but custody and management for his *cestui que trust* and the purchaser is chargeable with notice of the trustee's authority to sell.¹⁷

43. GIFTS OF SHARES OF STOCK.

A voluntary transfer of stock, by its owner, perfected by delivery and acceptance, becomes an executed contract and is irrevocable by the

12—Thompson v. Williamson, 67 N. J. Eq. 212 (1904).

13—Flagg v. Baldwin, 38 N. J. Eq. 219 (Court of Errors & Appeals, 1884).

14—Thomas v. Williamson, 67 N. J. Eq. 212 (1904); Pratt v. Boody, 56 N. J. Eq. 429 (Court of Errors & Appeals, 1898); Clews v. Jamieson, 182 U. S. 461 (1900).

15—Sharp v. Stalker, 63 N. J. Eq. 596 (1902).

16—Myers v. Fridenberg, 70 N. J. Eq. 3 (1905).

17—Gaston v. American Exchange National Bank, 29 N. J. Eq. 98 (1878); Prall v. Tilt, 28 N. J. Eq. 479 (Court of Errors & Appeals, 1877).

owner, for it was founded upon the mutual consent of the parties in reference to a right or interest passing between them. Thus, it was held that while a married woman may not bind herself by promise to pay the debts of another, she is invested with power to dispose of her property and may transfer it to secure the payment of the debt of another, and when she has actually made such transfer, she cannot afterwards, at will, avoid it.¹

The delivery of a certificate of stock without actual transfer or a written assignment or power to transfer, although accompanied with words of gift, does not constitute a valid gift *inter vivos*.²

Where stock stood in a testator's name on the books of the corporation, the fact that the certificate is found in the executor's possession, and that the testator gave him a power of attorney to receive and assign any scrip or dividend due him from the company, are not conclusive evidence of a gift of the stock to the executor.³

44. MORTGAGES AND PLEDGES OF SHARES OF STOCK.

Where certificates of stock, accompanied by a power of attorney irrevocable, for the transfer thereof, are delivered as collateral security for notes, the transfer is effectual as against an attaching creditor of the registered holder of such stock. The court said:

"It is obvious, moreover, that so far as regards the legal ownership of the stock, if the transfer upon the books of the company alone can constitute legal ownership, that the contract of sale is as fully executed by delivering the certificate, with the power of immediate transfer on the books of the company, as by a formal assignment accompanying the certificate. The holder of a certificate of shares of stock accompanied by an irrevocable power of attorney to transfer them, is the apparent owner, and when he is the holder for value without notice, his title cannot be impeached."¹

In *Donnell v. Wyckoff*, 49 N. J. L. 48 (1886), it was held that where stock pledged stood on the books of the company in the name of the defendant and was pledged to the plaintiffs by the delivery of the certificate of stock, with an endorsement of transfer in blank, signed by the defendant, the pledge included the dividends that might be made upon the stock as well as the shares of stock. "The transfer of the stock on the company's books out of the defendant's name was contemplated by the endorsement of transfer on the back of the certificate. An actual transfer of the stock on the company's books was necessary to enable the plaintiffs to collect and receive dividends, if not to protect the stock from the defendant's other creditors. The proof is that the transfer

1—*Walker v. Dixon Crucible Co.*, 47 N. J. Eq. 342 (1890).

2—*Matthews v. Hoagland*, 48 N. J. Eq. 455 (1891).

3—*Smith v. Burnet*, 34 N. J. Eq. 219 (1881).

1—*Broadway Bank v. McElrath*, 13 N. J. Eq. 24 (1860); affirmed sub nom. *Hunterdon County Bank v. Nassau Bank*, 17 N. J. Eq. 496 (Court of Errors & Appeals, 1864).

was made to enable the plaintiffs to receive dividends, and upon the transfer on the books dividends to the amount of \$1,250. were received which are credited on the note. The transfer on the company's books effected no change of title. The title passed as between the parties by the delivery of the certificate with the endorsement of transfer. The surrender of the original certificate and the acceptance of a new certificate in the plaintiff's name, were not in violation of the bailment. They were acts necessary to effectuate the purposes of the bailment." It was held, therefore, that when the company, by legislative authority, afterwards reduced its capital and proportionately reduced the nominal value of the shares of its capital stock, the surrender by the pledgee of the original certificate of stock and the acceptance of a new certificate for the same number of shares was not a wrongful conversion.

When stocks and bonds pledged as collateral for the payment of a debt are sold by the pledgee, without authority, before the maturity of the debt, the pledgor may, at his election, either (1) ratify the sale and claim the proceeds, or (2) treat the unauthorized sale as a conversion, and recover the advance in the market price from the time of the sale up to a reasonable time within which to replace the securities, or (3) hold the pledgee for the breach of his duty to keep the property pledged until the maturity of the debt, and claim as damages the market value of the securities at that time.²

The market value of stock is the actual price at which it is commonly sold. That price may be fixed by sales of the stock in market at or about a given time. If no sales can be shown on the precise day, recourse may be had to sales before and after the day, and for that inquiry a reasonable range in point of time is allowable. Under a reference to ascertain the market price of a certain stock on a given day, the intrinsic value of the stock should not enter into the estimate, unless there has been no market price within a reasonable period, either before or after that day.³

45. ATTACHMENT OF SHARES OF STOCK.

Shares of stock, may be sold by auditors, in attachment proceedings.¹

It was held in *Curtis v. Steever*, 36 N. J. L. 304, that, whether a share of corporate stock be treated as a chose in action or as some other kind of a "right," it is capable of being attached under the statute. The fact that the certificate of stock is outside of the state cannot disturb this conclusion. The certificate is only evidence of title to the right; the substance of the right is at the domicile of the corporation. Even if the *situs rei* were deemed to be attendant upon the person of the owner outside of the state, that would not necessarily defeat the levy of an attachment. In *Mutual Fire Insurance Co. v. Chambers*, 53 N. J. Eq.

²—*Dimock v. United States National Bank*, 55 N. J. L. 296 (Court of Errors & Appeals, 1893).

³—*Douglas v. Merceles*, 25 N. J. Eq. 144 (1874).

¹—*Castle v. Carr*, 16 N. J. L. 394 (1838).

468, Vice-Chancellor Pitney, after an elaborate examination of the cases, reached the conclusion that in cases of foreign attachment jurisdiction over choses in action depended not upon the presence of the chose within the territorial jurisdiction of the court but upon ability to serve process of garnishment within that territory. When corporate stock is so far subject to the control of the corporation that its formal transfer cannot be perfected without the action of the corporation, process of garnishment may be effectually served upon the corporation at its domicile. Such process warns the corporation not to perfect any transfer without the permission of the court, and thus subjects that matter to the jurisdiction of the court. It was held, therefore, that shares of the capital stock of a domestic corporation are subject to attachment under the statute, although the certificate of stock be in the possession of the debtor outside of the state.²

Where the sheriff, as appeared by his endorsement upon the writ, went to the office of the company and, in the presence of a witness, attached the rights and credits, goods and effects of the defendant, being one share of stock of said company in his name on the books of the company, it was held that this was a substantial compliance with the provisions of the statutes, and that the provisions of the statute as to the mode of service are only directory.³

Where the return to the writ of attachment shows that shares of stock, standing in the name of a third person, and in the name of the debtor's wife, have been taken, the attachment will not be set aside on motion, as to these shares, where it is alleged there was a fraudulent transfer by the debtor to hinder, delay and defraud creditors.⁴

46. EXECUTION UPON SHARES OF STOCK.

Shares of stock are by statute made subject to the levy of a common-law execution (see Part II of this book).

Shares in corporations were not, in this state, the subject of sale under execution before the passage of the act of March 9th, 1842, entitled "An Act to Abolish Imprisonment for Debt."

In the Revision of 1846 these sections passed into the Act Respecting Executions, as the seventh and eighth sections of that act.

It was held under this legislation that the delivery of execution to the sheriff, did not bind this kind of property; that a levy made by the sheriff by mere inventory, without applying to the company, whose shares the defendant held, was not sufficient to defeat the rights of one purchasing such shares of the defendant. It was also strongly urged that actual notice to the defendant, if within the sheriff's jurisdiction, that his stock was levied upon, was required by considerations of public policy and commercial convenience, and this where the office of the corporation was within the sheriff's bailiwick.¹

2—Cord v. Newlin, 71 N. J. L. 438 (1904).

3—Cord v. Newlin, 71 N. J. L. 438 (1904).

4—Curtis v. Steever, 36 N. J. L. 304 (1873).

1—Princeton Bank v. Crozer, 22 N. J. L. 383 (1850).

The law prescribing the present mode of levy upon such property is embodied in the fourth, fifth, sixth and seventh sections of "An Act respecting any execution" (General Statutes, p. 1415, see p. below).

The earlier provisions referred to are retained substantially as first enacted, and in addition a mode is prescribed in the sixth section for effecting a levy where the custodian of the books, being the clerk, cashier or other officer of the company, is not a resident in the state. In such case the notice and requirement of certificate of the defendant's interest may be mailed to such officer of the company having the books. In addition to notice by mail, it is made the duty of such sheriff, "on the day of mailing such notice, to affix and set up, upon any office or place of business of such company within his county, a like notice in writing, and upon the same day to serve like notice in writing upon the president and directors of said company, or upon such of them as reside within his county, either personally or by leaving the same at their respective places of abode; and the sending, setting up and serving of such notices, in the manner aforesaid, shall constitute such levy taken a valid levy of such writ upon all shares of stock in such company held by the defendant in execution." "The mode thus prescribed for effecting a levy on stock was designed to and can scarcely fail of bringing notice to a defendant of the fact of levy, without direct communication with him. Notice directly to the defendant is not required to be given by the present law. Nor was it by the act of 1842." ²

47. DIVIDENDS.

The Corporation act provides (§ 30, as amended by P. L. 1904, p. 275) that the directors shall not make dividends except from its surplus, or from the net profits arising from the business of such corporation.

The Corporation act (§ 47, as amended by P. L. 1901, p. 246) further provides that unless otherwise provided in the original or amended certificate of incorporation, or in a by-law adopted by a vote of at least a majority of the stockholders, the directors of every corporation created under this act shall, in January in each year, after reserving over and above its capital stock paid in, as a working capital for said corporation, such sum, if any, as shall have been fixed by the stockholders, declare a dividend among its stockholders of the whole of its accumulated profits exceeding the amount so reserved, and pay the same to such stockholders on demand.

In *Camden Gas Light Co. v. State*, 54 N. J. L. 135 (1891), Magie, J., said that the word "dividend" as applied to incorporated companies, "means that amount which is set aside and designated by the managers of the company, to be divided among its members. * * * It is only in exceptional cases that all the profits which have accrued to an incorporated company may prudently be divided. At the discretion of

²—Knapp, J., in *Voorhis v. Terhune*, 50 N. J. L. 147, 159 (Court of Errors & Appeals, 1887).

the managers, sinking funds to meet debts falling due in the future, and funds to meet possible accidents or contingencies, may be established and portions of profits may be applied thereto. So moneys from such profits may well be expended in improving the plant and so providing for the extension of the business of the company or its being done in better and more profitable modes. How much should be thus used must be determined by the managers. The remainder, if any, may be divided."

Under section 30 of the Corporation Act, as amended in 1904, a dividend may be declared where the company has profits over and above the actual assets with which it began business, although the total assets may not exceed the debts and the nominal share capital. This was expressly held by the Court of Errors and Appeals in a suit brought by a stockholder to have a resolution for the payment of a dividend upon the preferred stock of the defendant corporation declared unlawful, null and void, and to restrain payment thereof. Mr. Justice Swayze said: "The question seems to us to involve only the construction of that act, and to turn upon the change introduced thereby. The cases cited from other jurisdictions are, therefore, of little assistance."

"The material language in the Act of 1896 is as follows:

"No corporation shall make dividends, except from the surplus or net profits arising from its business, nor divide, withdraw or in any way pay to the stockholders or any of them, any part of its capital stock or reduce its capital stock, except according to this Act."

"In the Act of 1904, this section is changed so as to read as follows:

"The directors of a corporation shall not make dividends except from its surplus or from the net profits arising from the business of such corporation, nor shall it divide, withdraw or in any way pay to the stockholders or any of them, any part of the capital stock of such corporation, or reduce its capital stock except as authorized by law."

"Under the Act of 1896, there was room to contend that the words 'net profits' were intended to be synonymous with the word 'surplus,' the language used was from the 'surplus or net profits.'"

"Under the Act of 1904 this contention is no longer possible; the language used is 'from its surplus or from the net profits.' The evident intent of the change is to point out two funds from which dividends may be made.

"Although the change in language indicates that the Legislature made a distinction between 'surplus' and 'net profits,' it does not necessarily follow that net profits means the difference between gross earnings and what may be called operating expenses. Such profits may be called 'annual profits,' and it may be that by 'net profits' the Legislature meant the 'net profits' upon the whole of the company's business from its organization. If either of these meanings is adopted, the declaration of the present dividend is justified. There was an excess of gross earnings over the operating expenses of the current year, and the value of the present assets exceeded the value of the actual assets with which the company began business. The complainant contends, how-

ever, that the term 'net profits' is used in neither of these senses, but in the sense of an excess of the value of the present assets over the par value of the capital stock issued and outstanding; and the claim is that since that stock was issued for property at a gross over-valuation, there can be no dividend until the difference between the actual value of the property and the value at which it was taken over, is made up. The argument is that the intent of section 30 is to prevent the capital stock being distributed in the form of dividends, and the words 'capital stock' are supposed to be used in that section as synonymous with 'share capital.'

"The ambiguity of the term 'capital stock' was noticed by this court in *Wetherbee v. Baker*, 35 N. J. Eq. 501. It may mean either the capital subscribed (the share capital) or the capital paid in, the actual assets with which the company does business. It seems to be used in both senses in this very section. When the Legislature forbids the dividing, withdrawing or paying to the stockholders any part of the capital stock, it means the capital actually invested; when it forbids the reduction of capital stock it means share capital subscribed or the authorized capital.

"We are led to the conclusion that the words 'capital stock' in the first instance means capital actually invested, by the fact that it is only actual assets that can be divided, withdrawn or paid over. These words are not apt words to apply to nominal or share capital, which may be reduced, but can hardly be withdrawn, divided or paid over. This capital actually invested does not include net profits arising from the business of the company for the reasons that the language of the section itself make a distinction between the declaration of dividends out of profits, and the withdrawing of capital; that another method of securing payment of the par value of the stock is provided in other sections of the Act; that the policy to be served by the prohibition of section 30 is to prevent the frittering away of the actual assets with which the company is to do business, not the nominal assets which it has never received and for which it still has a claim against the subscribers for unpaid stock. The section distinguishes between surplus and net profits; but if the complainant is correct in his contention that net profits mean only excess above the share capital, we see no distinction in fact, but only in bookkeeping entries.

"It may not infrequently happen that stock is issued on which avowedly only a partial payment is made of the amount subscribed which is, therefore, subject to further calls. We cannot think that in such a case where the company prospers there are no net profits available for dividends until the earnings accumulate to an amount equal to the par value of the shares. The complainant's brief concedes this, and the concession seems quite fatal to his argument.

"The language of section 47 supports this view. It requires the directors, after reserving over and above its capital stock paid in such sum as shall have been fixed as a working capital, to declare a dividend on the whole accumulated profits. Here the profits are clearly to be

ascertained by reference to the capital stock paid in and not to the nominal share capital. It would be quite inconsistent to require by section 47 a dividend out of the profits to be ascertained with reference to capital stock paid in, and to forbid by section 30 a dividend unless there were net profits over and above the amount of the nominal share capital.”¹

It is not necessary for the statute to confer upon corporations the power to regulate the matter of dividends by certificates of incorporation or by-laws. Without the express provisions of the statute, all corporations created under it would have full power to so act, not only by their certificates and their by-laws, but by ordinary resolutions of their boards of directors.

The history of the développement of the statutory rule in regard to the declaration of corporate dividends indicates that after various legislative experiments, the intention of this last enactment of 1901 was to permit the whole matter of the distribution of profits to be regulated by the will of a majority of the stockholders, expressed in the certificate of incorporation or a by-law.

The imposition of a rigid statutory rule controlling the distribution of profits by corporations seems to be peculiar to the legislation of New Jersey.

The first attempt to legislate so as to protect stockholders in respect of their reasonable expectations of dividends seems to have been made as recently as the year 1866. (P. L. 1866, p. 1034.) This first statute applied only to “manufacturing corporations within this state.”

The act of 1866 was made section 52 of the revised Corporation act of 1875, with the relaxed rule that the annual dividend day might be fixed not only by the charter but by the by-laws. (Rev. p. 186, § 52.)

In 1891 the law was amended by attaching to it a proviso to the effect that “accumulated profits,” which consist in “real property or merchandise necessarily employed in the business” of a corporation, should not be regarded as profits for the purpose of the declaration or payment of dividends, except so far as a majority of the directors or stockholders should by resolution provide. (P. L. 1891, p. 176.)

The revised Corporation Act of 1896 changed the statute under consideration in some important particulars. The law was made applicable to every corporation created under the act. The new statute committed the power of fixing a sum to be reserved from profits as a working capital to the stockholders, but provided that the corporation, by its certificate of incorporation or its by-laws, might give the directors power to fix the amount so to be reserved. The most significant change consisted in omitting the proviso which was attached to the law of 1891. Concerning this statutory provision Vice-Chancellor Stevenson said:

“The consideration of a few of the most apparent defects in this law

1—Goodnow v. American Writing Paper Co., 73 N. J. Eq. 692 (Court of Errors & Appeals, 1908).

of 1896 strongly supports the construction which I have heretofore indicated as the proper one to be placed upon the statute of 1901. The stockholders are to fix a 'sum to be reserved as a working capital.' If we assume that the 'sum' to be reserved need not be in the form of money, still the reservation must be made in good faith in order to provide a 'working capital.' The power to reserve property for a 'working capital' could not be exercised merely for the purpose of preventing the declaration of a dividend. Large accumulations of profits might exist in the form of property which in no sense could be deemed working capital, but which could not be distributed without enormous loss.

"The greatest danger to many of the largest corporations of the state, under the law of 1896, and under this law of 1901, if, as the complainant contends, the majority of the stockholders, through a certificate or a by-law, are unable to save themselves and their corporation from such danger, arises from the use of the phrase 'accumulated profits,' which has come down through all these statutes from 1866.

"The phrase 'accumulated surplus,' as used in statutes regulating the assessment of corporate property, has been defined in a series of decisions in this state.² In the latter case Mr. Justice Van Syckel, speaking for the court of errors and appeals, says (at p. 493): 'The term accumulated surplus, in its application to stock companies, is well understood to refer to the fund they have in excess of their capital and liabilities.'

"Counsel for complainant, in his argument, as I understand it, practically insists that 'accumulated profits' in this statute, providing for what must almost in every case be a distribution of cash, is the same thing as 'accumulated surplus,' as defined by Mr. Justice Van Syckel. If this view is correct, the danger of the large corporations of the state, under the act of 1896, must have been perfectly plain to the revisers of that act in 1901. A corporation, at the demand of a single stockholder, might be obliged to sell a large portion of its assets at a ruinous loss; or in anticipation of the sale of those assets make large loans of money, which would greatly injure its credit, in order to effect a distribution of profits which were merely exhibited on paper as the result of the action of accountants and appraisers—profits which had in fact not been realized and which might turn out never in fact to have been earned. A perfectly honest stocktaking, as of December 31st, 1903, might show that the United States Steel Corporation had an 'accumulated surplus' which might also be deemed 'accumulated profits' to the extent of \$66,000,000. If a distribution of \$66,000,000 thereupon became necessary in January, 1904, it is possible that a decline in the value of the stock on hand of the corporation, and the failure of some of its debtors, might wipe out a large part of the profits before the dividend checks had been cashed. * * *

"But let it be supposed that the term 'accumulated profits' is to be

2—Trenton Iron Co. v. Yard, 42 N. J. L. 357 (1880); Mutual Benefit Life Insurance Co. v. Utter, 34 N. J. L. 489 (1869).

construed as meaning something different from the term 'accumulated surplus.' It certainly seems reasonable to hold that the phrase 'accumulated surplus,' as used in a tax act dealing with the value of property of a certain date means a widely different thing from the phrase 'accumulated profits' as used in a statute providing for the distribution of profits in cash among stockholders. There seems to be great force in the argument that this series of New Jersey statutes did not attempt to foist upon a corporation an annual indebtedness to its stockholders enforceable at law and payable on demand in cash equal to the surplus or profits, or net profits, which might appear on paper as the result of the annual stocktaking.

"What our statutes, I think, have tried to do has been to regulate the discretion of directors in declaring dividends by laying down a convenient rule defining a situation in which stockholders may justly claim that dividends have been 'improperly' withheld. I know of no rule of equity which requires directors to sell property of the corporation at a loss, or borrow money in order to pay dividends, because an appraisalment of the corporate assets exhibits a surplus or what bookkeepers might call profits."³

"What are profits? How are profits to be distinguished from the assets in which they are merged until they are in some way set apart or earmarked by the corporation or its officers or directors by whom the assets are held? With large profits exhibited on the books, possibly all the cash on hand or readily obtainable, without loss, would represent capital only. In the case of this defendant corporation, it is fair to presume that the amount of capital kept on hand in the form of cash, considered absolutely, is an immense sum of money. If the statute imposes upon directors the duty to stockholders of using due diligence to realize profits in cash, so as to make distribution possible, by what rule is the amount to be so realized to be ascertained by a court? The general rule of courts of equity heretofore referred to, applicable to such a situation, might be formulated and enforced, but the question is, what is the statutory rule to determine the amount of 'accumulated profits' when the difference between assets and liabilities, including the capital stock of the defendant corporation, is \$66,000,000? If the statutory rule which directs the annual distribution by a corporation of the 'whole of its accumulated profits,' after setting off the working capital which has been fixed by the stockholders, only means that such part of its accumulated surplus shall be so distributed as the directors, in good faith, exercising a sound discretion, adjudge capable of being surrendered by the corporation to the stockholders without injury to its business, then it is manifest that no case, under the statute, is presented by the complainant's bill.

"The very great difficulty of interpreting and applying our statute, in case the phrase 'accumulated profits' is to be considered as meaning something different from the phrase 'accumulated surplus,' is illus-

3—*Stevens v. United States Steel Corporation*, 68 N. J. Eq. 373 (1905).

trated in the case of *Park v. Grant Locomotive Works*, 40 N. J. Eq. 114, decided by Vice-Chancellor Van Fleet in 1885. In that case it was a contract and not a statute which had to be construed. The corporation was under a contractual obligation to distribute annually 'all the net profits of the company,' after the payment of taxes, insurance and expenses of maintenance. The directors distributed \$105,000 of profits, but retained \$205,000, which the complainant sought to have divided according to the contract. The learned vice-chancellor held that the words 'net profits,' as used in the contract, did not mean 'the whole sum as appearing as net profits on any annual statement if such sum represented securities taken by the corporation in the course of its business which were not yet due, but which could not be converted except at a price much less than that which the corporation had given for them,' but, on the contrary, meant 'net gains which had been actually realized or which could be quickly realized without loss by a sale of assets representing the profits.' This case points out distinctly the difference between actual or realized profits and anticipated or earned profits, and supports the view that a contract or a statute which binds directors to charge their corporation with a debt to its stockholders, immediately payable in cash, because of the possession of net profits or accumulated profits, should be construed to have in contemplation profits which exist practically in cash, i. e., in the form in which they must be paid out.

"If a construction should be placed upon the phrase 'accumulated profits' in our statute similar to that which was placed by Vice-Chancellor Van Fleet upon the phrase 'net profits' in the contract which was before him in the above-cited case, then it seems to me in this case, and in large numbers of other cases which are liable to come up, a most delicate and difficult task will be assigned to the court of chancery, and the court of chancery will be asked to place itself in the seats of the directors and decide important questions relating to the management of their corporations, which, according to a well-settled principle, a court of equity invariably declines to consider or decide. In my opinion, it was the intention of the act of 1901 to so amend the law of the state that a majority of the stockholders of a corporation could exercise the power in a certain specified way, of preventing any one stockholder from bringing a vexatious suit whenever the annual balance sheet showed accumulated profits, and in such suit casting upon the court of chancery the difficult task above referred to.

"Viewing the situations to which any statutory rule for the distribution of the profits of corporations would be applicable, and especially the situation of these immense aggregations of capital invested in widely variant forms of property, often of fluctuating value, which long after 1866 began to come under the control of our corporation law, I think the conclusion is unavoidable that the legislature of 1901 recognized that the general rule prevailing in other jurisdictions should be adopted, or rather readopted, in New Jersey—the rule which allows

the majority of the stockholders of a corporation, acting in good faith, to control the business of declaring dividends, and provides a means whereby such majority can limit the power of a single stockholder to sue for an annual distribution of 'accumulated profits,' as they are made to appear on paper, to cases of bad faith or gross abuse of discretion. This change in our law was made by transposing and altering the phraseology of the statute. Down to 1901 every statute made its rule as to annual dividends alterable by the corporation only as to the time in the year when such dividends must be declared. The plain grammatical meaning of the act of 1901 was in this respect changed, and, in my opinion, such change was made for good reasons to carry out the legislative intent which I have indicated. This is not a case, it seems to me, where it is possible to conclude that, notwithstanding the change in the wording of the revised law, no change of the meaning of the law was intended." ⁴

The general rule is well settled that the directors of trading corporations are invested with a wide discretionary power in regard to the distribution of profits in the form of dividends among the stockholders. Subject, of course, to provisions in the charter, and also to the by-laws of the company, it is for the directors to say whether profits shall be distributed to the stockholders or retained for the purpose of the corporate business. It is, however, equally well settled that this discretionary power is not absolute, and when the directors "improperly refuse to make a division of unused profits," a court of equity will intervene on behalf of any stockholder who may complain.⁵

But so long as they act in the exercise of an honest judgment their authority is absolute. It was held, however, that where the corporate scheme contemplated "the buying, selling, exchanging and improvement of real estate" during a corporate life of fifty years, it was evident that the power to determine how much of the current earnings should be re-invested in the business must reside somewhere, and that by the implied concurrence of the shareholders this right was committed to the board of directors, with an implied condition that the confidence thus reposed should be honestly exercised with reference to the avowed purpose of the company. "When the business of a trading corporation has by successful management been brought to a condition of financial prosperity, in which the profit, after the payment of all indebtedness, is more than twenty times the amount of the original capital, a reasonable share of the net earnings should be applied to the payment of stock dividends, though a part be reserved to enlarge the

4—*Stevens v. United States Steel Corporation*, 68 N. J. Eq. 373 (1905). See also *Bassett v. U. S. Cast Iron Pipe & Foundry Co.*, 74 N. J. Eq. 668 (1908).

5—*Stevens v. United States Steel Corporation*, 68 N. J. Eq. 373 (1905); *Laurel Springs Land Co. v. Fougerey*, 50 N. J. Eq. 756 (Court of Errors & Appeals, 1893); *Griffing v. Griffing Iron Co.*, 61 N. J. Eq. 269 (1901); *Trimble v. American Sugar Refining Co.*, 61 N. J. Eq. 340 (1901); *Raynolds v. Diamond Mills Paper Co.*, 69 N. J. Eq. 299 (1905).

business itself. In the present case there was no proof of any honest purpose to enlarge the business of the company, the withholding of the dividends being a mere pretext for an opportunity to absorb the profits by fraudulent devices. Generally suits to compel the declaration of dividends must be in the name of the corporation, but where the corporation is a defendant and the majority of the directors are parties charged with fraud in this very respect the suit will proceed to a decree upon the complainant's rights. In the present case the prayer of the complainant should be met by a decree requiring the defendants, as directors, to declare a dividend of all the net earnings not needed for the legitimate purposes of the company's business. And in order that the matter may remain under the scrutiny of the court, the decree directing the defendants to account and elect as to salary or commissions should be supplemented by requiring them to declare such reasonable dividends and to do so from time to time as the financial status of the business may warrant, with leave to the complainant to apply to the court of chancery for relief in the premises if it be necessary for him so to do." ⁶

The power given to the stockholders, under the act of 1896, to fix the amount reserved is absolute, and it is discretionary. So long as the capital reserved is retained for the benefit of the whole company, and not distributed to the majority stockholders at the expense of the minority, the Court of Chancery will not interfere with or question the action of the majority of the stockholders because of the supposed motive of reserving their own profits instead of dividing them.⁷

Where the stockholders of a corporation unanimously adopted a by-law placing the power to declare or withhold dividends in the board of directors, and, acting thereon, the board used the profits for expanding the business without the payment of dividends through a series of years, it was held that there was a waiver of the right of the stockholders to invoke the aid of a court of equity to compel the declaration of dividends, in the absence of a showing that the policy of expansion being pursued by the board had become unreasonable.⁸

Where there is no allegation in the bill that the defendant corporation has not declared regular dividends, but the contrary appears, nor that the accumulated profits on hand, as alleged are greater than what had been reserved and fixed by the stockholders as a working capital it is demurrable. The presumption must be that the action of the company in that respect is satisfactory to the majority of the stockholders, and the mere fact, if it be true, that it has a large amount of surplus, is not sufficient, of itself, to give a single stockholders a right to come into court and compel a dividend of that surplus.⁹

6—*Laurel Springs Land Co. v. Fougerey*, 50 N. J. Eq. 756 (Court of Errors & Appeals, 1893).

7—*Lillard v. Oil, Paint & Drug Co.*, 70 N. J. Eq. 197 (1903).

8—*Raynolds v. Diamond Mills Paper Co.*, 69 N. J. Eq. 299 (1905).

9—*Trimble v. American Sugar Refining Co.*, 61 N. J. Eq. 340 (1901).

In the Griffing case it was argued on demurrer that the bill was lacking in equity because the duty devolved by the statute upon directors was merely permissive, and that the purpose of the relief was a decree to control discretionary action, but that if the duty was mandatory, complete relief would be afforded by mandamus out of a court of law. The court said, however, "It is obvious that mandamus would not furnish complete relief unless, perhaps, in cases where accumulated profits in excess of reserved working capital have been so ascertained and determined as to fix the amount applicable to dividends. In other cases such as that in hand a discovery and accounting is necessary to complete relief. But in any view of the statutory provisions in question the right to relief in equity by compelling a division of profits among stockholders is, I think, perfectly settled. Such was the view expressed by Vice-Chancellor Pitney, in his opinion in *Fougeray v. Cord*, 5 Dick. Ch. Rep. 185. In the court of errors, Mr. Justice Garrison, in expressing the unanimous opinion of that court for a reversal of some part of the decree advised by Vice-Chancellor Pitney, distinctly approved the view of the jurisdiction of equity in such cases in this language: 'The power of the court of chancery to order the directors of a trading corporation to make a division of unused profits when they improperly refuse to do so is undoubted.' *Laurel Springs Land Co. v. Fougeray*, 5 Dick. Ch. Rep. 756. The decree made in that case required an accounting for the purpose of settling what remained for dividends, and the court of errors afterward dealt with and approved that act. S. C. 12 Dick. Ch. Rep. 318. Upon this authority I deem the jurisdiction of equity invoked by this bill to be beyond question, and the demurrer must be overruled." ¹⁰

In *Stevens v. United States Steel Corporation*, 68 N. J. Eq. 373 (1905), it was held that the provisions of sections 5 and 6 of Article VI of the by-laws of the United States Steel Corporation (see Part III of this book) cover the whole subject of the declaration of dividends and displace the statutory rule.

Under section 30 as it read before the amendment in 1904, it was held by the Court of Errors and Appeals that the directors who participated in the declaration and payment of a dividend out of the capital, are liable to the corporation for so doing, even though the corporation has not become insolvent. The court said: "The liability is created for the benefit of the corporation as well as its creditors. It arises in case of dissolution or insolvency, i. e., where there is a voluntary winding up of a solvent corporation as well as when the corporation is wound up in invitum, on account of insolvency. If punctuation is to govern in the construction of this statutory provision, therefore, the situation is this: although the directors are answerable to the corporation for the injury inflicted upon it by the impairment of its capital, yet, the corporation cannot compel them to make good the loss

10—*Griffing v. Griffing Iron Co.*, 61 N. J. Eq. 269 (1901).

which it has sustained by their illegal act, unless it elects to abandon its business and go into liquidation. A construction which imputes to the legislature the intent to force a solvent corporation into liquidation as a condition of enabling it to recover from its directors the money necessary to make good the impairment of its capital by them, should not be adopted unless such intent is manifest."¹¹

In *Siegman v. Electric Vehicle Co.*, 72 N. J. Eq. 403 (Court of Errors and Appeals, 1907), it was held that the prohibition of section 30 as it read before the amendment of 1904, that "No corporation shall make dividends except from the surplus or net profits arising from its business, nor divide, withdraw or in any way pay to the stockholders or any of them any part of its capital stock, or reduce its capital stock, except according to this act," is to be read in connection with the provisions of sections 27 and 29 respecting a decrease of capital stock and deals with the payment of a dividend out of capital as amounting in effect to a reduction of capital stock. The court held, that while it is a function of the board of directors of a corporation to determine whether net earnings or surplus exist applicable to the payment of dividends, they cannot, by erroneous determination of this point, confer either upon themselves or upon the corporation power to make dividends of capital. Mr. Justice Pitney said: "The prohibition of section 30 of our Corporation Act is addressed not merely to the directors, but to the company." So far as illegal withdrawals of capital are concerned the act appears to be unchanged and they are still *ultra vires*, for making which the directors would still be liable to the corporation as in the case of any other *ultra vires* act.

The statutory provision holding directors personally responsible for dividends paid out of the capital instead of the profits, does not exonerate the stockholders from liability to repay such dividends for the benefit of the creditors of the corporation.

This liability is not based on any statute, but upon the equitable ground that the stock is regarded as a trust fund for all the debts of the corporation, and no stockholder can entitle himself to any dividend or share of it until all the debts are paid. And the remedy is in equity and not at law.¹²

Such dividends are recoverable by the receiver of the corporation on its insolvency so far as may be necessary for payment of debts.¹³

A stockholder receiving in good faith dividends declared by the officers of a corporation without knowledge that they were paid out of the capital instead of the profits, holds them under a constructive trust, and an action by a receiver for their recovery to make assets to pay debts, is barred in six years. Equity will not, however, interpose the bar of limitations to prevent a receiver of a corporation from re-

11—*Appleton v. American Malting Co.*, 65 N. J. Eq. 375 (Court of Errors & Appeals, 1903).

12—*Williams v. Boice*, 38 N. J. Eq. 364 (1884).

13—*Mills v. Hendershot*, 70 N. J. Eq. 258 (1905).

covering from the directors and officers of the corporation dividends paid to them out of the capital of the corporation, such acts being in fraud of the corporation and its creditors.¹⁴

In *Mills v. Hendershot*, the opinion of Chancellor Runyon in *Williams v. Boice* was relied on as holding the statute of limitations not applicable. Vice-Chancellor Emery said, in answer to this: "That was a bill by the receiver of an insolvent bank to recover dividends alleged to have been paid out of capital, and on general demurrer to the bill, this question of the application of the statute, although not raised either in the demurrer or at the argument, was considered by the chancellor, and the statute declared inapplicable. As the bill was filed to recover all dividends paid after a certain date, and included (as I read the case) dividends paid within six years, the decision of the question whether the statute applied, was not necessary or involved on a general demurrer. Under these circumstances, I think I am justified in considering the question as not conclusively disposed of by the opinion."¹⁵

An allegation, in a bill to recover dividends unlawfully paid, from the stockholders, that there was a deficiency of other assets besides the money divided, to pay the debts, is sufficient, on demurrer; and there is no necessity for an averment that any of the present debts existed when the dividend was declared, or that there are not enough assets now to pay the debts which have been proved (in insolvency); nor can objection be taken to the bill for multifariousness, on the ground that all the stockholders are defendants.¹⁶

The directors alone have the power to declare a dividend of the earnings of the corporation. Until it is so declared the stockholder has no certain and fixed individual right. They may not only declare the amount of dividends, but also the time of their payment and may fix the time of payment at a future day, so that it be reasonable and in good faith.¹⁷

When a dividend is declared it becomes a debt due from the corporation to the individual stockholder, and after demand of payment, an action at law may be maintained for its recovery.¹⁸

Like any other debt, it may be set off against the debt of the stockholder to the corporation.¹⁹

If a dividend is declared payable elsewhere than at the office of the corporation, the party through whom it is paid becomes the agent of the company; and if such agent fail to pay it over to the stockholder

14—*Mills v. Hendershot*, 70 N. J. Eq. 258 (1905).

15—*Mills v. Hendershot*, 70 N. J. Eq. 258 (1905).

16—*Williams v. Boice*, 38 N. J. Eq. 364 (1884).

17—*King v. Patterson & Hudson River R. R. Co.*, 29 N. J. L. 82 (1860).

18—*King v. Patterson & Hudson R. R. Co.*, 29 N. J. L. 504 (Court of Errors & Appeals, 1861); *Jackson's Adm'rs v. Newark Plankroad Co.*, 31 N. J. L. 277 (1865).

19—*King v. Patterson & Hudson River R. R. Co.*, 29 N. J. L. 504 (Court of Errors & Appeals, 1861).

entitled to receive it, the loss falls upon the corporation, and an action may be maintained against it by the stockholder to recover the dividend.²⁰

Directors may select a bank of good credit and deposit the money there to pay dividends, giving notice to each stockholder of such deposit. If the stockholder, after receiving due notice, neglects to draw the money within a reasonable time and a loss is incurred by failure of the bank, it will fall upon the stockholder, and he cannot call upon the company to reimburse him. Advertisement in a newspaper circulating daily in the vicinity of men of business is presumptive evidence of notice, but may be overcome by positive proof, by the stockholder, that such notice did not come to his knowledge.²¹

The payment of an employee of a corporation, as compensation for services, of a percentage of the profits of the business is not a division of the "accumulated profits" to which stockholders are entitled under section 47 of the General Corporation act, but an expense of the business which must be deducted from receipts before the accumulated profits can be ascertained.²²

Where trust funds, of which the income, interest, or profits are given to one person for life, and the principal bequeathed over upon the death of the life tenant, are invested either by the trustee, or at the death of the testator, in stock or shares of an incorporated company, the value of which consists in part of an accumulated surplus or undivided earnings laid up by the company, such additional value is part of the capital. This, as well as the par value of the shares, must be kept by the trustee intact for the benefit of the remainder-man; but the earnings on such capital, as well as on the par value of the shares, belong to the life tenant.²³

The rule to be applied as between life tenants and remaindermen of shares of stock with respect to dividends, has been settled in this state by the case of *Lang v. Lang's Executors*, 57 N. J. Eq. 325 (Court of Errors and Appeals, 1898), followed in the Court of Chancery by *Lister v. Weeks*, 60 N. J. Eq. 215 (1900); affirmed 61 N. J. Eq. 675 (1900). In the case first cited the court (at page 327) said: "The underlying principle applicable * * * is that no corporate dividend declared after the right to the income has become severed from the ultimate ownership of the stock upon which such dividend is declared, belongs in equity to the person entitled to income except so far as it is derived from the earnings of the stock after such severance." Alluding to the distinction which has been made in previous authorities between extraordinary dividends and ordinary or current dividends with respect to ap-

20—*King v. Patterson & Hudson River R. R. Co.*, 29 N. J. L. 504 (Court of Errors & Appeals, 1861).

21—*King v. Patterson & Hudson River R. R. Co.*, 29 N. J. L. 82 (1860).

22—*Bennett v. Millville Improvement Company*, 67 N. J. L. 320 (Court of Errors & Appeals, 1902).

23—*Van Doren v. Olden*, 19 N. J. Eq. 176 (1868).

portionment of those of the first class and not of the others, the court (at page 328) said that it could not "assent to the idea that some dividends should stand on a different footing from others" and pointed out that to hold that "where a life estate begins one day before a dividend is declared, the entire dividend shall go to the life tenant, may be convenient, but certainly is unjust." There must, however, be evidence before the court of the period for which the dividends were declared, the time of the previous dividend, the source from which it was derived, whether earnings currently made or surplus wholly earned before the decease of the stockholder and other like matters.²⁴

A corporation entered into an agreement with a trustee for the substitution of non-cumulative for cumulative dividend-paying preferred stock, and the funding of dividends in arrears. The agreement provided that the corporation should issue to each assenting holder of preferred stock a funding certificate for the arrears, which should carry interest at four per cent. per annum, payable exclusively out of the net profits of the corporation for the year, and should not be cumulative, and should be payable in priority to any dividends on the capital stock for the year. It was held that the agreement must be read in the light of well-established legal rules, and that, so read, it is not to be construed as providing for an unequal distribution of the surplus earnings among the preferred stockholders; and that it would be the duty of the directors, when out of net earnings they set aside a sum equal to four per cent. of the funding certificates, to set aside, apart, a proportionate sum, whether that sum be called interest or dividend, for the benefit of those who do not assent.

The court said further that if the agreement should be read as an attempt to vary the rights of non-assenting stockholders, it did not follow that an injunction should issue restraining the consummation of the scheme. "The proposed plan, formulated in the agreement, is manifestly beneficial to the company, and is desired by the great majority of its shareholders, common and preferred. No irreparable injury can result to the complainant Willcox if it be carried into effect. If, after it has been consummated, any attempt is made to pay dividends to the other preferred shareholders, in preference to himself, he can easily, by a proper proceeding in this court, assert his legal right to a proportionate share, notwithstanding the provisions of the agreement, if it shall be read as denying his rights. As to the objection taken to the scheme by the common stockholders, it seems to be quite untenable. It is manifestly for their benefit that the preferred stockholders should waive their right to the immediate payment of the dividends that have accumulated in the past and their right to all cumulative dividends in the future in consideration of a small reservation out of the earnings for a redemption fund and of a small payment thereof of interest, so called, both reservation and interest being non-cumulative and being given in lieu of the company's obligation immediately to pay, out of all

24—Brown v. Brown, 72 N. J. Eq. 667 (1907).

surplus earnings, all past dividends. This works to the benefit of the common stockholders, in that it greatly accelerates their chances of participation in dividends, by postponing the payment of the considerable sum of \$550,000, which is no longer an immediate and prior charge upon all surplus earnings. If the earnings in any one year exceed the eight per cent. dividend due the preferred stockholders for that year and the two above-mentioned items amounting together to less than \$50,000 per annum, the directors will be able to devote the excess to the payment of a dividend to the common stockholders, discharged of their obligation to make up dividends in arrears. It is hard to understand how such an arrangement can be an irreparable injury to common stockholders—an injury which calls for the immediate interposition of this court by preliminary injunction. If illegal, its illegality is not apparent. The case, on this branch of it, comes within the familiar rule of the *Citizens' Coach Co. v. Camden Horse Railroad Co.*, 2 Stew. Eq. 299.”²⁵

25—*Wilcox v. Trenton Potteries Co.*, 64 N. J. Eq. 173 (1902).

V. MEMBERS AND STOCKHOLDERS.

48. WHO ARE MEMBERS OR STOCKHOLDERS; HOW RELATION IS CREATED AND TERMINATED.

A subscriber to the stock of an incorporated company whose subscription is received by the directors, and regular certificates thereof issued to him, is a bona fide stockholder entitled to transfer his stock and to vote at elections, even though he has paid nothing for his stock.¹

Sometimes it is provided in the certificate of incorporation that the registered holder only shall be liable for calls. In such a case a transfer is not binding upon the company until the transfer is registered on the company's books.²

"Can the owner of shares of stock in corporation A, which he has held for several years, and who is entitled, without question, at any moment, except when the books of transfer are closed preparatory to an election or a dividend, to have a certificate issued to him, but has never exercised that right, and whose shares stand on the books of the company in the name of his grantor, who, however, has no interest therein, have a standing in this court to ask the court to prevent corporation A, by its officers, from voting upon the shares in question?

"It may be admitted that the stockholder has not the right to vote in person on his shares. He may be content to permit his assignor to vote thereon because that assignor is willing to vote as he, the actual owner, directs, or, what is perhaps the more common practice, to give him a proxy to vote in his name, but such disability, if it be a disability, is the only one under which the actual owner labors. Should any dividend be declared his assignor will receive it for the actual owner's benefit, and I think there can be no doubt that the latter has the right in equity to intercept its payment by the corporation to his assignor. Except in these matters his title is absolute and complete.

"I am able to perceive little, if any, resemblance in the relations between the registered owner and the real owner of shares of stock and those which exist between the ordinary trustee of an express trust and his *cestui que trust*. In the latter case the trustee is the actual owner and the *cestui que trust* the owner only in equity. In the case of a transfer of a certificate of shares of stock by an assignment in the usual form for value received and a delivery of the certificate, which is the usual mode of making title to shares of stock, the complete legal and beneficial title passes, and the transfer on the books of the company is not necessary in order to make the legal title complete. The situation resulting from such an assignment, without transfer on the books of the company more nearly resembles that of the owner by

1—Downing v. Potts, 23 N. J. L. 66 (1851).

2—Brown, Receiver, v. Morton, 71 N. J. L. 26 (1904).

actual common law conveyance in fee of real estate which he has not taken the trouble to have recorded.

"The status of the holder by legal assignment of a certificate of stock which has not been transferred on the books of the company is in some respects better than that of a real estate owner whose deed is unrecorded, because, in the absence of actual notice, the grantor of such a deed may make a good title to a purchaser in good faith for value.

"This subject was exhaustively dealt with by Chancellor Green, in *Bank v. McElrath* (13 N. J. Eq. 24). He there gave the holder by assignment of certificates of stock who held them as collateral security for a debt, with the usual transfer in blank from the owner, to whom they were issued and in whose name they stood on the books of the bank, preference over an attaching creditor of the registered owner. He points out the true office of the rule that the transfer must appear on the books of the bank to be to protect the corporation from conflicting claims and to prevent disputes as to the right to vote and the like.

"I am unable to perceive why a clear title to the shares of stock, with the immediate right to have the stock transferred on the books of the company, does not give the owner a right to the ear of this court to protect his interest in the corporation and its management.

"Of course, the holder of shares of stock, whether standing in his name or not, may in a proper case be subject to estoppel by reason of something done or omitted to be done by himself or his predecessor in title, and it may well be that the case he presents to the court in asking its aid should show affirmatively that his shares are not burdened by any such estoppel. But such estoppel arises, if at all, quite independent of the status of the owner upon the books of the corporation.

"Such a case was *Trimble v. Sugar Company* (61 N. J. Eq. 340), where Trimble was the registered holder of the shares on which he based his rights.

"Such was clearly the ground of decision in *Hodge v. Steel Corporation* (64 N. J. Eq. 90), and, on appeal (64 N. J. Eq. 807). In that case there were three complainants—Hodge, Smith and Curtis. The case was heard on an application for an injunction and upon affidavits on both sides. The object was to enjoin a certain proposed action of the defendant corporation which required the sanction of a majority of the stockholders. It appeared affirmatively that Hodge was the registered owner of certain shares of stock which had not given any consent to or sanction of the proposed action. Hence his standing was upheld both in this court and on appeal. Smith held stock whose predecessor in title had expressly assented to the proposed action.

"This was held a complete answer as to him. As to Curtis, the learned vice-chancellor says: 'Complainant Curtis, at the time of the bill, was not, nor has he ever been, the owner of record of any shares, nor is there any affidavit of ownership of shares made by him. In the absence of such affidavit showing his ownership and the certificate or

certificates of shares which he holds, it cannot be known whether or not the previous holders of his shares, or any of them, have assented to the plan. If such previous holders of either the Smith or Curtis shares have assented, then neither Smith nor Curtis is entitled to a preliminary injunction against the execution of the plan assented to, so far as their rights rest on the ownership of these shares. My opinion is that a suit of the present character must be based upon an ownership of record at the time of filing the bill, and that the ownership of shares standing in the name of another will not be sufficient to maintain the suit. The suit, it will be observed, is not one which is brought against a third person to assert the general right of a holder of stock considered as property where ownership of shares transferred in blank and not actually transferred on the books might be sufficient evidence of ownership of the stock, but it is a suit brought by a complainant solely in the character of a stockholder, against the company itself and its directors, to restrain the violation of his rights as a stockholder, and to restrain proceedings alleged to be ultra vires and fraudulent against the company. This can be done only by a stockholder who holds a complete title as stockholder under the by-laws of the company, or who, being the owner of the stock, has done everything within his power to complete the title.'

"I respectfully suggest that the last sentence was unnecessary for the determination of the question before him unless it is to be read, as I believe it is, as referring to what he had previously said. That declaration of the law is relied upon here by the demurrants. When the Hodge Case was determined on appeal (64 N. J. Eq. 807), the court said, 'Curtis, so far as he appears, owns no stock,' and that is all the court said. When we consider that there was no affidavit of Curtis that he owned any stock and no admission of such ownership by demurrer, we can see that this language of the court signifies nothing for present purposes."³

In the absence of notice of an adverse claim a corporation is protected in paying a dividend to the holder of record of stock.⁴

An infant may own stock in a corporation. Thus where an insolvent debtor permitted his infant son who lived with him to contract for wages to be paid to the son, it was held that the stock of a corporation into which the wages were afterwards converted, and which stood in the name of the son, was not subject to the claims of his father's creditors.⁵

The holder of a voting trust certificate is a stockholder within the meaning of section 65 of the Corporation Act and may institute insolvency proceedings under the statute.⁶

3—O'Connor v. International Silver Co., 68 N. J. Eq. 67 (1904); affirmed 68 N. J. Eq. 680 (Court of Errors & Appeals, 1905).

4—Campbell v. Perth Amboy, etc., Co., 74 Atl. 144 (1909).

5—Wisner v. Osborne, 64 N. J. Eq. 614 (1903).

6—O'Grady v. United States Independent Telephone Co., 71 Atl. 1040 (Court of Errors & Appeals, 1909).

49. EVIDENCE OF MEMBERSHIP.

The certificate of stock is *prima facie* evidence of membership (see § 39 above), but in determining the right to vote at corporate meetings the books are the only evidence to be considered and in case of conflict the transfer book is conclusive (see Corporation act, § 40).

50. NATURE OF RELATION; RIGHTS AND DUTIES IN GENERAL.

By becoming a stockholder a person assumes the obligations which the lawful provisions of the certificate of incorporation attach to that relationship. Those provisions take the place and possess the qualities of a charter granted by the legislature and form a contract between the company and the stockholders.¹

Owners of shares of stock are under no disability to vote because they are also directors of the corporation. In *United States Steel Corporation v. Hodge*, 64 N. J. Eq. 807 (Court of Errors and Appeals, 1902), the court said: "They voted upon that resolution not as directors, not in their fiduciary capacity, but solely in the right of the shares of stock held by them. A most valuable privilege, which attaches to the ownership of stock in a corporation, is the right to vote upon it at any meeting of stockholders. As to that resolution, considered by itself, as stockholders, they owed no greater duty to their co-stockholders than those stockholders owed to them. Like other stockholders, they had a right to be influenced by what they conceived to be for their own interest, and they cannot lawfully be denied that right; nor can it be limited or circumscribed by the fact that they occupied the position of directors in the company."

Individual stockholders cannot question, in judicial proceedings, corporate acts of directors if the same are within the powers of the corporation and in furtherance of its purposes, are not unlawful or against good morals and are done in good faith and in the exercise of an honest judgment.²

51. STOCKHOLDERS' SUITS.

There are two classes of wrongs for which a stockholder may seek redress in the courts, the first involving an injury to his individual rights directly and peculiarly to himself, the second an injury to the

1—*Brown, Receiver, v. Morton*, 71 N. J. L. 26 (1904), citing *Ellerman v. Chicago Junction R. R. Co.*, 49 N. J. Eq. 217 (1891); *Loewenthal v. Rubber Co.*, 52 N. J. Eq. 440 (1894); *Clearwater v. Meredith*, 1 Wall. 25, 40; *Oregon Railroad Co. v. Oregonian Railroad Co.*, 130 U. S. 1.

2—*Ellerman v. Chicago Junction Railway Co.*, 49 N. J. Eq. 217 (1891); *Willoughby v. Chicago Junction Railway Co.*, 50 N. J. Eq. 656 (1892); *Benedict v. Columbus Construction Co.*, 49 N. J. Eq. 23 (1891); *Edison v. Edison United Phonograph Co.*, 52 N. J. Eq. 620 (1894); *Berger v. United States Steel Corporation*, 63 N. J. Eq. 809 (Court of Errors & Appeals, 1902); *Elkins v. Camden & Atlantic R. R. Co.*, 36 N. J. Eq. 241 (1882); *Park v. Grant Locomotive Works*, 40 N. J. Eq. 114 (1885); *Donald v. American Smelting, etc., Co.*, 62 N. J. Eq. 729 (Court of Errors & Appeals, 1901).

corporation directly and only indirectly or derivatively through the corporation to the stockholder. The distinction is fundamental both in the substantive rules of law and the procedure for their enforcement. Causes of action upon both classes of injuries cannot, therefore, be joined in a single suit. In the first class he sues in his own right, in the second as the representative of the corporation. In the former he is the actual complainant and the corporation or the directors, as the case may be, or both, are the actual defendants. In the latter the corporation although a nominal or formal defendant is in reality the complainant. In the former the action is brought either in a court of law or a court of equity, like other actions, according to whether the cause of action is of a legal or equitable nature. In the latter, the suit is always in equity, the basis of the court's jurisdiction being its control over trusts and fiduciary relations. It is fundamental that a stockholder cannot bring an action at law in the name of the corporation for any purpose.¹

The rule of the common law courts is that in all cases in which the duty is definite and due to the individual, such promise will be implied; but, that, on the other hand, when such duties are indefinite or are due to the members in their collective capacity, no such promise can be inferred. Thus, as an illustration, the duty to declare a dividend, where profits are in hand, is one of indefinite and general character alluded to, it is, to a certain extent, discretionary in its nature, and is due, in no sense, to any particular member, but to the community of members, and hence there is no promise for its performance to be drawn in favor of the separate shareholder. On the other hand, a special action on the case will lie against an incorporated company for a refusal to permit one of its stockholders to subscribe for a *pro rata* proportion of new stock, issued by the corporation with a view to increase its capital. It is also one of the obligations of a corporation, inherent in its essential nature, to permit, at the request of the holder, a transfer of its stock; and as this is an obligation not due to the members at large, but exclusively owing to the individual stockholder, it was properly held that the law, upon its ordinary principles, implied an agreement on the part of the company to discharge such specific obligation.²

A suit in a court of equity to fasten upon a corporation a debt to its stockholders which theretofore has not existed is instituted for the benefit of the stockholders severally as individuals, and if defended will naturally be defended by the corporation as representing the interests of the stockholders as a body corporate in the prosecution of the corporate business, for which the assets are held, and which may be injuriously interfered with by any diminution of the assets. In such a suit the corporation is the proper party defendant.³

1—Silk Co. v. Campbell, 27 N. J. L. 539 (1859).

2—Jackson's Adm'rs v. Newark Plankroad Co., 31 N. J. L. 277 (1865).

3—Laurel Springs Land Co. v. Fougerey, 50 N. J. Eq. 756 (Court of Errors & Appeals, 1893); Griffing v. Griffing Iron Co., 61 N. J. Eq. 269 (1901);

In the case of *Hawes v. Oakland*, 104 U. S. 450 (1881), the Supreme Court of the United States, in laying down the principles governing the second class of cases, in which a stockholder of a corporation may maintain a suit in equity in his own name, founded on a right of action existing in the corporation itself, and in which it is the appropriate complainant, recognized the following grounds: Where some action is taken or threatened by the managing board of directors or trustees of the corporation, which is beyond the authority conferred on them by the charter or other source of organization; or where there is such a fraudulent transaction completed or contemplated by the acting managers, in connection with some other party, or among themselves, or with other stockholders, as will result in serious injury to the corporation or to the interests of the other stockholders; or where the board of directors, or a majority of them, are acting for their own interests in a manner destructive of the corporation itself, or of the rights of the other stockholders; or where the majority of the stockholders themselves are oppressively and illegally pursuing a course, in the name of the corporation, which is in violation of the rights of the other stockholders, and which can only be restrained by the aid of a court of equity. And the court adds that possibly other cases may arise in which, to prevent irremediable injury, or a total failure of justice, the court would be justified in exercising its powers.⁴

And in an early case in New Jersey the court said: "It is undoubtedly the general rule that a suit brought for the purpose of compelling the ministerial officers or agents of a private corporation to account, or for misconduct, must be in the name of the corporation itself, and cannot be maintained in the name of an individual stockholder. In special cases, however, where justice cannot be otherwise obtained, and where the directors, officers and managers having control of the corporation and its affairs, are guilty of misconduct that amounts to a breach of trust, it will be permitted."⁵

Actions of the second class are *sui generis*, in this, that the complainant does not prosecute in his own right—a stockholder, as such does not have a legal or equitable estate in the corporate property; his only right of property is to a proportionate share of the profits of the business while the company is in operation, and to a proportionate share of the net assets on its dissolution. Unauthorized dealing with the franchises or funds of the corporation directly injure it as a legal entity; it is the franchises of the corporation which are to be misused, the funds of the corporation which are to be misappropriated, and the corporation is, therefore, the party to be injured and should itself seek redress. This class of cases must not be confounded with the preventive remedy

Trimble v. American Sugar Refining Co., 61 N. J. Eq. 340 (1901); *Stevens v. United States Steel Corporation*, 68 N. J. Eq. 373 (1905).

4—*Elkins v. Camden & Atlantic R. R. Co.*, 36 N. J. Eq. 5 (1882).

5—*Brown v. Vandyke*, 8 N. J. Eq. 795 (Court of Errors & Appeals, 1853).

of every stockholder to restrain acts *ultra vires* the corporation, which belong to the first class of actions described above,⁶ and the recovery to be obtained, whether pecuniary or otherwise, is for its benefit and belongs to it alone.

A stockholder may bring a suit in equity in his own name to enforce a right of the corporation, without first requesting the directors to sue, when it is made to appear that if such request had been made it would have been refused, or, if granted, that the litigation following would necessarily be subject to the control of persons opposed to its success. Where the directors of a corporation are themselves the wrongdoers, or the partisans of the wrongdoer, they are incapacitated from acting as the representatives of the corporation in any litigation which may be instituted for the correction of the wrong which it is alleged they have committed or approved.⁷

Where there has been no actual refusal, the burden is on the stockholder who brings the suit to show the existence of such a state of facts as justifies the conclusion that an application to the board to prosecute would be futile.⁸

If the complainant sets forth a good cause of action and there is a right in the corporation to recover, it is a clear breach of trust on the part of the directors not to proceed to recover the same. For them to reply that it is by them deemed inexpedient to do so is only to emphasize the breach of trust they are committing by not doing so.⁹

The statement that a majority of the present board of directors were, and are, among the persons against whom relief is sought by the bill, discloses a situation which relieves the complainant from the duty of applying to them to bring suit in the name of the corporation.¹⁰

In *Siegman v. Maloney*, 65 N. J. Eq. 372 (Court of Errors & Appeals, 1903), it was alleged in excuse of the failure of the plaintiff to apply to the directors to bring suit, that five of twelve directors in office at the time of the institution of the suit were upon the board at the time when the alleged illegal dividends were declared and paid; that one other of the directors was a brother of and connected in business with one of the individual defendants and that still another was "an employee and representative of one of the other individual defendants." The court, however, said: "The presumption is that, notwithstanding

6—*Willoughby v. Chicago Junction Railways, etc. Co.*, 50 N. J. Eq. 656 (1892).

7—*Knoop v. Bohmrich*, 49 N. J. Eq. 82 (1891); affirmed 50 N. J. Eq. 485 (Court of Errors & Appeals, 1892); *Willoughby v. Chicago Junction Railways, etc. Co.*, 50 N. J. Eq. 656 (1892); *Barry v. Moeller*, 68 N. J. Eq. 483 (1904).

8—*Siegman v. Maloney*, 65 N. J. Eq. 372 (Court of Errors & Appeals, 1903); *Willoughby v. Chicago Junction Railway Co.*, 50 N. J. Eq. 656 (1892).

9—*Groel v. United Electric Company of New Jersey*, 70 N. J. Eq. 616 (1905).

10—*Appleton v. American Malting Co.*, 65 N. J. Eq. 375 (Court of Errors & Appeals, 1903).

the relations existing between the two directors and two of the individual defendants, against whom relief is sought, the former would faithfully discharge the duty which they owed to the corporation and its stockholders, although their action would necessarily have an injurious effect upon the interests of those defendants. Neither the existence of blood nor of business relationship justifies a presumption of dishonesty under the conditions referred to."

Stockholders are not held to be in laches unless they have unreasonably delayed proceedings after knowledge of the facts.¹¹

In *Herrick v. Dempster*, 73 N. J. Eq. 145 (1907), the corporation defendant joined in a demurrer that the complainant had not by his bill stated such a case as to entitle him to any relief of any sort as to the matters therein contained. It also demurred on the ground that the complainant had failed to show any necessity for prosecuting the suit in his own name. It was held that under these demurrers it was a fair inference that a request to sue would not have been acceded to. "So if on the face of the demurrer it appears that the company is uniting with the directors in denying that it has any cause of action against some of their number, when on the face of the bill it is apparent that it has, is it to be inferred that the attitude assumed when the demurrer was filed was that which would have been taken before it was filed? In the English practice, the question could not arise. The stockholder makes the company a co-complainant. Under our practice, the company is quite anomalously made a defendant. Hence, the difficulty * * * I regard the point, however, as not open to argument, for it appears to have been necessarily involved in the decision in *Siegmán v. Maloney*, 65 N. J. Eq. 372 (Court of Errors and Appeals, 1903), and to have been then decided against the contention of complainant in this suit, both here and on appeal. I have examined the record of that case and I find that a demurrer of precisely the same kind was interposed by the company, the only difference being that there the other defendants filed separate demurrers, while here the company and the defendants sued and joined in the same demurrer—a difference that seems to be quite immaterial. As the court of Errors and Appeals sustained the decree of this court overruling all the demurrers filed in that case, the practice appears to have been settled."¹²

A plea, filed in behalf of the corporation that it deems it inexpedient to bring the suit, only raises the question whether the directors may prohibit a stockholder from bringing such suit if in the judgment of the board it is inexpedient; but the facts set up in the bill are not traversed by the plea.¹³

Vice-Chancellor Garrison said in the *Groel* case: "The real meritorious

11—*Barry v. Moeller*, 68 N. J. Eq. 483 (1904); *Cook on Corporations*, §§ 732, 733.

12—*Stevens, V. C.*, in *Herrick v. Dempster*, 73 N. J. Eq. 145 (1907).

13—*Groel v. United Electric Company of New Jersey*, 70 N. J. Eq. 616 (1905).

question in each case, however, is between the formal defendant and the actual defendant, although the machinery for bringing the case into court is set in motion by the complainant. The formal defendant should have the right to object to and to question the power of the complainant to bring a suit in its behalf, but I do not think that the form in which it should raise this objection should be by plea or answer or demurrer. In the English practice, the corporation in whose behalf the suit is brought is made a party complainant. If the corporation thus made a party complainant objects by petition, it is eliminated as a complainant and is made a defendant. (*Duckett v. Gover*, 6 Ch. Div. 82, 85 [Master of Rolls Jessel, 1877]; *Wilson v. American Palace Car Co.*, 64 N. J. Eq. 534 [Vice-Chancellor Emery, 1903].) If we should adopt a practice by which the formal defendant should raise its objection by a petition setting forth such facts as it thought relevant, and giving the reasons why it thought the complaining stockholder should not be permitted to prosecute a suit in its behalf, the court could, upon such an issue, properly determine the only question that ever should be permitted to be litigated between the formal defendant and the complainant without in any way interfering with the real, meritorious issue against the actual defendant." ¹⁴

After a hearing of the cause upon its merits, it is too late to consider the objection that application had not been made to the board of directors to bring suit.¹⁵

Under a bill filed by a stockholder of a company on behalf of himself and all other stockholders, praying that directors of the company may be made to respond to said company for losses sustained by it, by reason of their fraudulent conduct, a decree cannot be made for the sole benefit of the complainant.¹⁶

Where a stockholder of a corporation sued in its behalf to recover salaries paid certain officers in excess of the amount to which they were entitled and on other grounds, and recovered an amount as having been illegally paid as salary, but failed to substantiate the other charges of the bill, it was held that he was entitled to receive out of the money recovered, a reasonable amount of counsel fees, but not the whole of his counsel fees and disbursements.¹⁷

The decree in such a suit is a bar to a suit instituted by another stockholder upon the same questions.¹⁸

It is improper practice to join in one bill a stockholder's suit and the statutory action to have the corporation adjudicated insolvent. "It seems to me that the court, for its own protection, ought not to allow

14—*Groel v. United Electric Company of New Jersey*, 70 N. J. Eq. 616 (1905).

15—*Marr v. Marr*, 73 N. J. Eq. 643 (Court of Errors & Appeals, 1908).

16—*Landis v. Sea Isle City Hotel Co.*, 53 N. J. Eq. 654 (Court of Errors & Appeals, 1895).

17—*Lillard v. Oil, Paint & Drug Co.*, 70 N. J. Eq. 197 (1903).

18—*Willoughby v. Chicago Junction Railways, etc., Co.*, 50 N. J. Eq. 656 (1892).

such an inconsistent, inconvenient and confusing jumble of remedial proceedings. The rules of evidence governing the two proceedings are entirely different. In the one case, as I have indicated, what is practically a trial is held; in the other, a limited hearing upon affidavits is had and upon that hearing the responsive allegations of the answer and of the affidavits on behalf of the defendant have a special force. My conclusion is that what now is to be considered is merely the motion for an interlocutory order for a preliminary injunction in aid of the prosecution of the cause of action set forth by the bill against all of these defendants under the general equity jurisdiction of the court. This result is in accordance with what was practically an election made by counsel for the complainant upon the oral argument. The bill, therefore, so far as it undertakes to present the statutory action against the Old Dominion Copper Mining and Smelting Company as an insolvent corporation, will be entirely disregarded."¹⁹

In reference to the right of the court to dismiss without hearing, or to refuse protection by preliminary injunction because of the mala fides or bad motives of the complainant in prosecuting the suit, it has been declared in some cases to be the rule that where a suit is brought by a stockholder for the professed purpose of asserting and protecting the rights of the company, and the complainant's rights are purely representative, the suit must be, bona fide, a suit of the company, and that if it is in reality the suit of others than the complainant, and of persons not interested as stockholders, who, in fact, control the suit for adverse interests, then the suit may be dismissed as not the suit of the company and as an imposition on the court. The leading case is *Forrest v. Manchester, etc. Railway Co.*, 4 DeG., F. & J. 126 (Court of Appeals, 1861). In this case the directors of a rival company directed and controlled the suit and indemnified the complainant against costs. The bill attacked a proceeding as ultra vires, and the complainant's standing was purely representative, and it was dismissed on the ground that the complainant was imposing on the court in assuming to represent the company's rights. In *Seaton v. Grant*, the complainant, who had lost money by speculating in shares of a company, afterwards bought stock and filed a bill as stockholder, attacking certain proceedings of the directors as fraudulent uses of the company's funds. It was satisfactorily proved that he bought the shares for the purpose of bringing the suit and of being bought off and thus reimbursing himself for his losses. On a motion to dismiss the bill, the *Forrest Case* was relied on, but the motion was denied, both in the court below and on appeal. Lord Cairns said, in giving the opinion on appeal, that the main distinction between the case in hand and the *Forrest Case* was that in the latter case the complainant was a mere puppet in the hands of others who controlled the suit and indemnified him. In the decision of these cases, based on the representative character of the complainant, the bona fides of the

¹⁹—*Pierce v. Old Dominion, etc., Smelting Co.*, 67 N. J. Eq. 399 (1904).

suit seems to depend primarily on the question whether the suit is in fact the suit of the complainant, or is in fact the suit of and controlled by others not interested as stockholders. And the rule as to refusing protection by injunction, or declining to hear the cause of a complainant because of his improper motives in acquiring his rights, or the improper purposes of enforcing them by suit, has not been extended in England to cases where the complainant is asserting a right of property inherent in himself as stockholder or otherwise. In *Mutter v. E. & M. Railway Co.*, 38 Ch. Div. 92 (Court of Appeals, 1888), it was held that the right to inspect the register of stock, which was given to stockholders by statute, was a personal right of the stockholder, and would be protected by injunction, if necessary, and that this right to protection was not to be denied, because complainant took the stock at the instance of a rival company and for the purpose of supporting their interest. Where the suit concerns or is based on the complainant's own property rights, either legal or equitable, it is settled in New Jersey that the bad motives of the litigant in insisting upon his equitable rights cannot be considered as a basis for refusing to recognize his rights. In *Davis v. Flagg*, 35 N. J. Eq. 491 (1882), on a bill to foreclose a mortgage purchased by the complainant, the money secured by the mortgage was due, but it was found by Vice-Chancellor Van Fleet, on satisfactory proofs, that the complainant was not in good faith prosecuting the suit to recover his money, but had purchased the mortgage and was prosecuting the suit to oppress the defendant, and to aid a third person who had litigation with the defendant. The vice-chancellor held, on final hearing, that the process of the court of equity could not be used for inequitable ends, and directed that unless complainant, on tender of the amount due, assigned his mortgage to persons designated by defendant, his suit should be stayed. On appeal, it was said by Chief-Justice Beasley, delivering the opinion, that the legal pursuit of a man's right cannot be deemed either illegal or inequitable, and that to sanction the rule that a legal or equitable right is not enforceable in the court of chancery, if the motive leading to the acquisition of such right has been immoral or otherwise censurable, would be at variance with some of the most primary principles of our system of jurisprudence. In *Elkins v. Camden & Atlantic Railroad Co.*, 36 N. J. Eq. 467, an interlocutory injunction restraining an illegal amendment of by-laws, made by directors for the purpose of continuing themselves in office, was granted to a stockholder. On appeal the objection was taken that the stockholder was not a bona fide stockholder; that his stock had been purchased with the money of rival companies and was held in the interest of those companies, and the control of the business in the interest of those rival companies was contemplated. It was therefore insisted that he had no standing in equity for protection by preliminary injunction. But the court of appeals held that the right to hold the stock and vote on it was a statutory property right and that complainant could not be deprived of this right, because he proposed to use his legal right for purposes thought by others to be

inimical to the corporation. "These cases, I think, establish the rule that where the only method of protecting or asserting a property right of complainant is in a court of equity, the court cannot refuse to decide or hear a complainant upon the question of right, merely because of his improper motive in the acquisition or prosecution of his rights. That the motive of a complainant in prosecuting an equitable property right is to be bought off is not a reason for dismissing the case and refusing to try the question of right. Complainant is entitled to have the question of such alleged equitable right tried. If the complainant's rights are legal as well as equitable, the court of equity may perhaps, on the final hearing or on the application for preliminary injunction, consider the question of motive as bearing upon the right to equitable relief, or remitting complainant to his purely legal rights. But where his property rights are equitable only, it would seem to be clear that whatever his motives in prosecuting the suit may be, he is not only entitled to have his case heard on final hearing, but also to have the protection by preliminary injunction, if his right be sufficiently established and such protection is absolutely necessary for the protection, *pendente lite*, of the equitable right." ²⁰

Nor is the acquiescence of the complaining stockholder a bar to relief. "Another ground upon which the right of the complainant to maintain this action is attacked, is that either they, or those from whom they purchased their stock, participated in the distribution of the illegal dividends, and are for that reason (as it is contended) disqualified from maintaining this suit, unless and until they return into the treasury of the company so much of the illegal dividends as was paid upon the stock which they hold. But this contention is based upon a misconception of the real situation. The complainants do not bring the suit to establish any right of their own, or because they are personally entitled to the relief sought. They are permitted to sue *ex necessitate rei*, because the interests of those in control of the corporation are hostile to the interests of the corporation itself. Although, on the record, the corporation is a party defendant, yet, in reality, the complainants represent it. Except in name, the suit is an action brought by the corporation; it is maintained solely for its benefit, and the final relief, when obtained, belongs to it and not to the complainants. The fact that the complainants, or those from whom they purchased their stock, participated in the distribution of the illegal dividends, is no bar to the right of the corporation to obtain the relief sought." ²¹

In *Knoop v. Bohmrich*, 49 N. J. Eq. 82 (1891), it was held, however, that where one stockholder agreed with another, at the formation of a corporation, that the other might pay for his stock with property, at a

20—Vice-Chancellor Emery in *Hodge v. United States Steel Corporation*, 64 N. J. Eq. 111 (1902).

21—*Appleton v. American Malting Co.*, 65 N. J. Eq. 375 (Court of Errors & Appeals, 1903).

valuation agreed upon by them, and afterwards consented to the issue of stock in execution of the contract, though the corporation was not bound by their contract, the consenting stockholder would be held to be bound by it to the extent of depriving him of the right to maintain an action to compel the other stockholder to pay for his stock in a manner different from that agreed upon.

Where a stockholder owning a small portion of the stock of a corporation brings suit in equity for an alleged misconduct in the management of the corporate business, it has been held that he must show a clear cause by distinct affirmative allegations, even if they include allegations of a negative character, and that the bill should also allege that neither the complainant nor his predecessor in interest ever acquiesced in such policy.²²

52. POWERS AND FUNCTIONS OF STOCKHOLDERS COLLECTIVELY IN RESPECT TO THE MANAGEMENT OF CORPORATE AFFAIRS; THE PRINCIPLE OF MAJORITY RULE.

"In this connection," said Vice-Chancellor Pitney, "it is worthy of remark that the stockholders, as such, have no power to make any contract or execute any work. Their power is confined to electing directors and advising them in their conduct of the business of the company."¹

And in *Plaquemines Tropical Fruit Company v. Buck* (52 N. J. Eq. 219 (1893)), Vice-Chancellor Green said:

"The resolution of the stockholders (authorizing the issue of stock in exchange for property to be purchased by the corporation) can only be considered as advisory and as giving their consent. The function of this meeting of incorporating shareholders was for organization in the first place, the adoption of by-laws and the election of directors afterwards. It may sometimes become necessary in the transaction of some kinds of business of a corporation, to have the consent of all the stockholders, or of a certain proportion of them, and resolutions giving such consent or advice have the effect of empowering the directors to act. But the board of directors is the legal executive, recognized as such not only in practice and on principle, but by the statute."

In *Durfee v. Old Colony Railroad Co.*, 5 Allen 230, Chief-Justice Bigelow says: "It may be stated as an indisputable proposition, that every person who becomes a member of a corporation aggregate by purchasing and holding shares agrees by necessary implication that he will be bound by all acts and proceedings within the scope of the powers and authority conferred by the charter, which shall be adopted or sanctioned by the vote of the majority of the shareholders of the corporation, duly taken and ascertained according to law. This is the unavoidable result of the fundamental principle that the majority of the

²²—*Trimble v. American Sugar Refining Co.*, 61 N. J. Eq. 340 (1901).

¹—*Loewenthal v. Rubber Reclaiming Company*, 52 N. J. Eq. 440 (1894).

stockholders can regulate and control the lawful exercise of the powers conferred on a corporation by its charter." ²

53. RELATION OF THE MAJORITY TO THE MINORITY STOCKHOLDERS.

The general rule is that the individual stockholders are not trustees for each other, but each may, as a member of the general corporate body, exercise his individual rights and vote equally with other stockholders on the ratification of a contract in which he is interested, and ratification or adoption of the contract is valid even if carried by his vote.¹

This right of the majority (statutory or other) either to originally direct or to affirm contracts or other proceedings in which the directors or the majority stockholders are interested, is not, however, absolute, but is subject to the necessary qualification that the majority, although they may deal with the assets of the company, cannot so deal with them as to divide these assets more or less between themselves to the exclusion of the minority.²

The majority stockholder of a corporation does not manage the corporation, nor does he "go into the business" of the corporation. The directors of the corporation manage its business.³

"Authorities have been cited to support the proposition that an individual or a corporation holding a majority of the capital stock of another corporation sustains, by reason of such holding, a fiduciary relation to the minority stockholders, and therefore it is argued the acquisition of a majority of Fidelity stock by the Prudential company should be avoided. (Noyes, *Intercompany Relations*, § 300; *Farmers' Loan & Trust Co. v. New York & N. R. Co.*, 150 N. Y. 410; 7 *Thomp. Corp.* § 8223.) But these authorities only hold, in effect, that the fiduciary relation arises when the majority stockholder assumes control of the corporation and dictates the action of the directors. The majority stockholder is not made a trustee for the minority stockholders in any sense by the mere fact that he holds a majority of the stock, or by the further fact that he uses the voting power of his stock to elect a board of directors for the corporation. The majority stockholder does not necessarily control the directors whom he appoints, and in fact, he has no right to control them, and if they are controlled by him, they may be violating their duty, for which he also may be liable. The majority stockholder may use his voting power so as to constitute all the holders of the minority stock the entire board of directors.

²—Quoted with approval in *United States Steel Corporation v. Hodge*, 64 N. J. Eq. 807 (Court of Errors & Appeals, 1902).

¹—*Hodge v. United States Steel Corporation*, 64 N. J. Eq. 807 (Court of Errors & Appeals, 1902); *Lillard v. Oil, Paint & Drug Co.*, 70 N. J. Eq. 197 (1903).

²—*Lillard v. Oil, Paint & Drug Co.*, 70 N. J. Eq. 197 (1903).

³—*Plaquemines Tropical Fruit Co. v. Buck*, 52 N. J. Eq. 219, 238 (1893); *Cook on Corporations*, § 709.

No liability of the majority stockholder to the minority stockholder for the misdeeds of his common trustees—the directors—can arise from the mere fact that the majority stockholder had the power to appoint, or, in fact, did appoint, these trustees. Such liability, however, may arise if the majority stockholder has made the derelict trustees his agents and dictated their conduct, and thus caused a breach of fiduciary duty, of which the minority stockholders complain. The correct principle, in my judgment, is laid down by Judge Kirkpatrick in the case of *Windmuller v. Standard Distilling Co.*, 114 Fed. Rep. 491. In that case the majority stockholder was a corporation, which had guaranteed the dividends upon the stock of the other corporation, the majority of whose stock it held. The business of the latter corporation was prosperous, and its directors had been appointed by the majority stockholder. These directors, whose honesty was not impeached, passed the initial resolution for the dissolution of their corporation. The minority stockholders made no complaint—made no attack upon this apparently gross breach of fiduciary duty on the part of these directors. But these minority stockholders filed their bill against the majority stockholder to restrain it from voting at the subsequent stockholders' meeting, in accordance with its own selfish interest, for the dissolution of the corporation, which dissolution necessarily involved the discharge of its contract of guaranty. The court, it seems to me, strictly in accordance with the well-settled principles, held that the complainants had bought their stock subject to the laws of New Jersey, which permitted the directors of their company to institute the proceedings for dissolution and which allowed every stockholder to vote on this question in accordance with his own selfish interest. The injunction therefore was denied, and it may be that a great wrong remained unredressed. If the complainants had attacked the action of the directors in instituting the proceedings for dissolution as the product of bribery, or improper influence of any kind, or of favoritism to the majority stockholder, who had appointed the directors, a very different case would have been presented. If the complainants had also charged that the directors—their trustees—had not only committed a gross and flagrant breach of duty, but that the majority stockholder had instigated them to do it, a strong case, apparently, would have been made out in which to hold the majority stockholder liable for damages.”⁴

54. MEETINGS OF STOCKHOLDERS.

The Corporation act provides (§ 17) that every corporation may determine by its certificate of incorporation or by-laws the manner of calling and conducting all meetings, what number of shares shall entitle the stockholders to one or more votes, what number of stock-

⁴—*Robotham v. Prudential Insurance Co.*, 64 N. J. Eq. 673 (1903). See also *Bijur v. Standard Distilling & Distributing Co.*, 74 N. J. Eq. 546 (1908).

holders shall attend, either in person or by proxy, or what number of shares or amount of interest shall be represented at any meeting in order to constitute a quorum. The act further provides, however, that in no case shall more than a majority of shares or amount of interest be required to be represented at any meeting in order to constitute a quorum and that if the quorum shall not be so determined by the corporation, a majority in interest of the stockholders, represented either in person or by proxy, shall constitute a quorum.

The Corporation act provides (§ 44) that in all cases where it is not otherwise provided by law, the meetings of the stockholders of every corporation of this state shall be held at its principal office in this state.

Independent of this statutory provision, it is a rule of law that a private corporation, whose charter has been granted by one state, cannot hold meetings and pass votes in another state.¹

A meeting may be held on a legal holiday. The third section of the act relating to public holidays (P. L. 1891, p. 83) expressly provides that the act shall not be construed as interfering with any person or corporation transacting business in this state, either private or public.²

Notice of a meeting may be waived by a stockholder. The general rule is that statutory provisions designed solely for the benefit of individuals, may be waived, and that only where the enactment is to secure general objects of policy or morals, does this rule not apply.³

By an amendment to section 16 of the Corporation act passed in 1902 (P. L. p. 217) it is provided that whenever, under any of the provisions of this act, or any amendment thereto, a corporation is authorized to take any action after notice to its members or stockholders, or after the lapse of a prescribed period of time, such action may be taken without notice and without the lapse of any period of time, if such action be authorized or approved and such requirements be waived, in writing, by every member or stockholder of such corporation or by his attorney thereunto authorized.

And where all the stockholders are represented at a meeting no informality in the manner of calling or giving notice of the meeting will be considered by the court.⁴

The waiver may be implied. Thus where stockholders, at a special meeting, did not object to it as irregularly called, but in a protest filed assumed its regularity, and the restraining order which they sought to procure was against a regularly called meeting, it was held that any objection to the regularity of the call for the meeting must be deemed to have been waived.⁵

Where a notice is required to be published for four weeks next pre-

1—Hilles v. Parrish, 14 N. J. Eq. 380 (1862).

2—Mueller v. Egg Harbor City, 55 N. J. L. 245 (1893).

3—Quick v. Corlies, 39 N. J. L. 11 (1876).

4—In re Griffing Iron Co., 63 N. J. L. 168 (1898).

5—Weinburgh v. Union Street Ry. Advertising Co., 55 N. J. Eq. 640 (1897).

ceding the day appointed for the meeting, there must be four whole weeks (i. e., twenty-eight days) between the first insertion of the advertisement in the newspaper and the day fixed for the meeting.⁶

Where the quorum is not fixed by the certificate or by-laws the common law rule applies, that where a society is composed of an indefinite number of persons, a majority of those who appear at a regular meeting constitute a quorum to transact business, and the presumption is that all the members present who observe silence when a question is put, concur with the majority of those who actually vote—this is, if the question be put audibly and explicitly.⁷

55. CALL OF MEETING BY THREE OR MORE STOCKHOLDERS.

It is provided by statute (Corporation act, § 46) that whenever, for any reason, a legal meeting of the stockholders of any corporation cannot be otherwise called, three or more stockholders having voting powers may call such meeting by publishing ten days' notice of the time, place and purposes of the meeting in a newspaper published in the county in which its principal office in this state is located, and mailing such notice to all stockholders whose post-office address is known or can be ascertained. It further provides that a meeting called as aforesaid shall be a legal meeting of the corporation, and that if there be no officers present, the stockholders may elect officers for the meeting and that the secretary of the meeting shall record the proceedings thereof in the book of minutes of the corporation.

56. CORPORATE ELECTIONS.

All elections for directors shall be by ballot, unless otherwise expressly provided in the charter or certificate of incorporation; the poll at every such election shall be opened between the hours of nine o'clock in the morning and five o'clock in the afternoon, and shall close before nine o'clock in the evening; the same shall remain open at least one hour, unless all of the stockholders are present in person or by proxy and have sooner voted, or unless all the stockholders waive this provision in writing; the persons receiving the greatest number of votes shall be the directors; provided, however, that unless otherwise provided in the original or amended certificate of incorporation, or in the by-laws approved at a stockholders' meeting, in all corporations formed under the provisions of this act, a majority in interest of all the stockholders shall be present in person or by proxy to constitute a quorum.¹

The proviso in the preceding paragraph changes the common law rule as to quorum (see § 54 above) so far as elections of directors are concerned.

The directors shall cause the secretary, or other officer designated by them having charge of said books, to make at least ten days before

6—See *Parsons v. Lanning*, 27 N. J. Eq. 70 (1876); *State, Barclay, pros., v. Elizabeth*, 41 N. J. L. 517 (1879).

7—*Worrell v. First Presbyterian Church*, 23 N. J. Eq. 96 (1872).

1—Corporation Act, § 34, as amended by P. L. 1902, p. 201.

every election after the first election, a full, true and complete list, in alphabetical order, of all the stockholders entitled to vote at the ensuing election, with the residence of each, and the number of shares held by each, which list shall at all times during the usual hours for business be kept at such principal and registered office, and open to the examination of any stockholder at said office, and if any officer having charge of such books or list shall, upon demand by any stockholder, refuse or neglect to exhibit such books or list, or submit them to examination as aforesaid, he shall for every such offense forfeit the sum of two hundred dollars, one-half thereof to the use of the state of New Jersey and the other half to him who will sue for the same, to be recovered by action of debt in any court of record, together with costs of suit, and the books aforesaid shall be the only evidence as to who are the stockholders entitled to examine such books or list, and to vote at such election; and the board of directors shall produce at the time and place of such election such books and list, there to remain during the election, and the neglect or refusal of said directors to produce the same shall render them ineligible to any office at such election.²

In case the right to vote upon any share of stock shall be questioned, the inspectors of the election shall refer to the stock books of the corporation to ascertain who are the stockholders, and in case of a discrepancy between the books, the transfer book shall control and determine who are entitled to vote.³

No person who is a candidate for the office of director shall act as judge, inspector or clerk of any election for directors; and if any candidate shall so act and be elected, his election shall be void, and the directors shall not appoint such person a director within twelve months next succeeding; this section shall not apply to the first election of directors.⁴

In *Downing v. Potts*, 23 N. J. L. 66 (1851), it was held that the statutory requirement that a list of the stockholders entitled to vote, with the shares held by each, shall be made out ten days prior to the election, is directory only, and non-compliance with it does not of itself make void the election. The court said: "The suggestion made upon the argument, and earnestly pressed upon the court, that the list of voters required to be prepared and exhibited previous to the election operates as a registry of voters, and must therefore be rigidly enforced, does not appear to be well founded. The list of stockholders does not operate as a registry of voters. The right of the stockholder to vote does not depend upon his name being contained in the list; on the contrary, the statute expressly declares that the books of the corporation shall be the only evidence who are the stockholders entitled to vote. * * *

A mere omission to make out the prescribed list the specified time before the election, or a failure on the part of the directors to exhibit at

2—Corporation Act, § 33, as amended by P. L. 1898, p. 408

3—Corporation Act, § 40.

4—Corporation Act, § 35.

the time and place of election a full, true and complete list of all the stockholders entitled to vote, constitutes in itself no sufficient ground to declare the election a nullity. Such omission may have been the result of accident or inadvertence, and may occasion no prejudice to the right of any corporator. There should, at least, be made manifest reasonable ground for apprehending that such omission operated prejudicially to the rights of the party complaining."

"The phrase 'the books containing the names of the stockholders' was used by the legislature in its ordinary and popular signification, and must be construed to mean all the books of the company in which the names of the stockholders are regularly registered. It includes, therefore, not only the books of original subscription, but the certificate book, and we incline to think the stock ledger also. But when the legislature declared that the books aforesaid shall be the only evidence who are the stockholders entitled to vote, it cannot be supposed that they designed to introduce new rules of evidence or to subvert its plainest principles. They declare that the books of the company shall be the only evidence of a right to vote. No other evidence shall be appealed to; no transfer of property in the stock, between the parties, shall avail against the evidence of the books upon the question of a right to vote. But they do not declare that every book in which the names of the stockholders may be written shall be evidence. * * * Now the stock ledger is not a book of original entries, it is a mere transcript from other books. It is not original evidence. It can be of no value as evidence, unless so far as it is sustained by the original entries. If made evidence by force of the enactment (which seems not entirely free from doubt) it never could have been designed to supersede, much less to contravene the original entries themselves. No entry, therefore, in the stock ledger, or omission of an entry in that book, could deprive a party of his right to vote, who appeared by the certificate book to be the owner of shares which did not appear to have been transferred, or who appeared by the transfer book to be the owner of stock there standing in his name." ⁵

In re U. S. Cast Iron Pipe Co., 74 N. J. L. 315, it was held that when the stock certificate book is used as a transfer book and all transfers of stock are made upon the surrender of a certificate with endorsement of the transfer of the same thereon, the certificate with its endorsement is the best evidence of the transfer and such stock certificate book is the transfer book within the meaning of the statutory requirement.

Votes cast for a candidate who is disqualified for the office, will not be thrown away, so as to make the election fall on a candidate having a minority of votes, unless the electors casting such votes had knowledge of the fact on which the disqualification of the candidate for whom they voted, rested, and also knew that the latter was, for that reason,

⁵—Downing v. Potts, 23 N. J. L. 66 (1851).

disabled by law from holding the office. Whether a vote given for a disqualified candidate is so completely thrown away as to be entirely void, is a mixed question, made up of the fact of disqualification, and knowledge by the voter of the legal effect of the disqualification. The inspectors have no power to pass upon the eligibility of the persons for whom votes are proposed to be cast. The question of eligibility is one that can be raised only in the courts.⁶

An election of directors not held at the annual meeting of stockholders nor at a special meeting called for the purpose on notice to the stockholders, nor with their unanimous consent, is void.⁷

The directors cannot by a by-law so change the time of holding the annual election that they will continue themselves in office more than a year, against the wishes of the holders of a majority of the stock. The right to change the day for the annual meeting is one which, from its very nature, can alone be exercised by the stockholders.⁸

If the election for directors of any corporation shall not be held on the day designated by the act or certificate of incorporation or by-laws, the directors shall cause the election to be held as soon thereafter as conveniently may be; no failure to elect directors at the designated time shall work any forfeiture or dissolution of the corporation, but any justice of the supreme court may summarily order an election to be held upon the application of any stockholder, and may punish the directors for contempt of court for failure to obey the order.⁹

The consequence of neglecting their duty is that the stockholders may compel them to do their duty by mandamus or otherwise immediately. "It was not intended to impair the charter right of holding an election at any time, but to hasten and quicken the directors in using it, and by putting it in the power of the stockholders to compel them to do it, if they should neglect. * * *" ¹⁰

Directors of a corporation who are in office cannot dispute the right of a stockholder to have a new election of directors held in accordance with the by-laws, on the ground that the stockholder bought his stock with the money of rival companies, and intends to use his legal rights as the holder of a majority of the capital stock for purposes detrimental to the interests of the corporation, and that the proposed election of directors is a step towards the illegal control of the property and the business of the corporation.¹¹

57. REVIEW OF CORPORATE ELECTION BY THE SUPREME COURT.

The Corporation Act provides (§ 42) that the Supreme Court, upon application of any person who may be aggrieved by or complain of

6—Matter of St. Lawrence Steamboat Co., 44 N. J. L. 529 (1882).

7—Dunster v. Bernards Land & Sand Co., 74 N. J. L. 132 (1906).

8—Elkins v. Camden & Atlantic R. R. Co., 36 N. J. Eq. 467 (1883).

9—Corporation Act, § 41.

10—McNeely v. Woodruff, 13 N. J. L. 352, 357 (1833).

11—Camden & Atlantic R. R. Co. v. Elkins, 37 N. J. Eq. 273 (Court of Errors & Appeals, 1883).

any election, or any proceeding, act or matter in or touching the same, reasonable notice having been given to the adverse party, or to those who are to be affected thereby, of such intended application, shall proceed forthwith, and in a summary way hear the affidavits, proofs and allegations of the parties, or otherwise inquire into the matter or causes of complaint, and thereupon establish the election so complained of, or order a new election, or make such order, and give such relief in the premises as right and justice may require; the court may, if the case require it, either order an issue to be made up in manner and form as it may direct, to try the rights of the respective parties to the office or franchise in question, or may give leave to exhibit, or direct the attorney-general to exhibit, an information in the nature of a *quo warranto* in relation thereto.

The procedure for contesting corporate elections, under section 42 of the Corporation act is applicable to all corporations in which there are shares of capital stock held by individuals as private property, the ownership of which may be registered in the corporate books, and will entitle the holder to vote for directors of the corporation.¹

In a proceeding under the statute, the inquiry before the court is limited to the consideration whether or not the election complained of has been conducted according to the statutory provisions. In any complaint to the court of such an election, or of any provisions touching the same, the grounds of complaint should appear in the application or affidavits, to the end that in the preliminary proceedings which give jurisdiction, it appear what violations of the statutory regulations have occurred.²

The admission of some illegal votes and rejection of some legal ones, may occur in almost any election, but when these errors shall be all corrected, if a majority of legal votes still appears for those who are returned, it would be wrong and unjust that the majority should not prevail.³

Where it was contended by the petitioner that the directors in office at the time the election was held had rendered themselves ineligible to re-election by their neglect or refusal to produce the books containing the names of the stockholders as required by section 33 of the Corporation Act, and the defendants insisted that such demand, if made at all, was made after the election was over, and that the conduct of the petitioners amounted to a waiver of the production of the books, the court held that justice could be done only by ordering a new election to be held.⁴

If, at the time and place appointed for the election of directors, the stockholders of a corporation assemble in two bodies and cast their

1—In re Newark Library Association, 64 N. J. L. 265 (Court of Errors & Appeals, 1900).

2—In re Leslie, 58 N. J. L. 609 (1896).

3—McNeely v. Woodruff, 13 N. J. L. 352, 361 (1833).

4—In re Directors of Jersey City Paper Co., 69 N. J. L. 594 (1903).

ballots at separate polls, the court in ascertaining the result of the election may consider the ballots cast at both polls.⁵

This statutory proceeding applies only to stock corporations.⁶

58. THE RIGHT OF A STOCKHOLDER TO VOTE; THE RIGHT TO VOTE BY PROXY; STATUTORY REGULATIONS AS TO VOTING AND PROXIES.

The right to vote is a property right, and except so far as changed by statute is subject to the same rules of law as other property.¹

At common law the right of a shareholder to vote at elections of officers and in regard to by-laws for the management of a business corporation was precisely analogous to the similar right possessed by the members of all corporations such as the members of a municipal corporation, for instance, still possess—that is, each shareholder was entitled to one vote if given by him in person.²

The Corporation act provides (§ 17) that every corporation may determine by its certificate of incorporation or by-laws what number of shares shall entitle the stockholders to one or more votes, and that (§ 36) unless otherwise provided in the charter, certificate or by-laws of the corporation, at every election each stockholder, whether resident or nonresident, shall be entitled to one vote in person or by proxy for each share of the capital stock held by him, but no proxy shall be voted on after three years from its date; nor shall any share of stock be voted on at any election which has been transferred on the books of the corporation within twenty days next preceding such election.

A person who is not a registered stockholder on the books of the company, is not entitled to vote, although he may be a bona fide owner of shares.³

The common law requires all votes of the members of a corporation to be given in person, and the right to vote by proxy does not exist unless the charter of such corporation either expressly or by legal implication confers such power. Section 17 of the Corporation act provides that absent stockholders may vote at all meetings by proxy in writing. As the validity of voting by proxy must rest upon the statute, and, as the enabling act is carefully limited to absent stockholders, it follows that when a shareholder who has given a proxy attends the election in person his proxy thereby becomes void, because he is not an absent stockholder.⁴

The inspectors cannot reject a vote offered by proxy because the

5—*In re Cedar Grove Cemetery Co.*, 61 N. J. L. 422 (1898).

6—*Hankins v. Newell*, 75 N. J. L. 26 (1907).

1—*Chapman v. Bates*, 61 N. J. Eq. 658 (Court of Errors & Appeals, 1900).

2—*Select Essays in Anglo-American Legal History*, Vol. III, p. 224; *Taylor v. Griswold*, 14 N. J. L. 222 (1834).

3—*In re Cedar Grove Cemetery Co.*, 61 N. J. L. 422 (1898); *In re Schwartz & Gray*, 77 N. J. L. 415 (1909).

4—*In re Schwartz & Gray*, 77 N. J. L. 415 (1909); *Chapman v. Bates*, 61 N. J. Eq. 658 (Court of Errors & Appeals, 1900).

written proxy was not acknowledged or proved. If the proxy is regular in form and apparently the act of the stockholder, the inspectors must receive the vote. A stockholder who desires to exercise his right to vote on his stock by proxy, is undoubtedly bound to furnish his agent with such written evidence of the latter's right to act for him as will reasonably assure the inspectors that the agent is acting by the authority of his principal. But the power of attorney need not be in any prescribed form, nor be executed with any particular formality. It is sufficient that it appear on its face to confer the requisite authority, and that it be free from all reasonable grounds of suspicion of its genuineness and authenticity; and the court, in reviewing the proceedings at an election, must be satisfied that the inspectors had reasonable grounds for rejecting the proxy. It is not a reasonable ground for rejecting a proxy that it is not dated. Before inspectors reject a proxy they are bound to resort to all reasonable means of satisfying themselves of its authenticity.⁵

Nor is a seal requisite to the validity of a proxy.⁶

Every person holding stock as executor, administrator, guardian or trustee, or in any other representative or fiduciary capacity, may represent the same at all meetings of the corporation, and may vote thereon as a stockholder, and every person who shall pledge his stock as collateral security may, nevertheless, represent the same at all such meetings, and may vote thereon as a stockholder, unless in the transfer to the pledgee on the books of the corporation he shall have expressly empowered the pledgee to vote thereon, in which case only the pledgee or his proxy may represent said stock and vote thereon.⁷

An executor or administrator is entitled to vote at an election of directors on the stock standing on the books of the corporation in the name of the testator or intestate, and no formal transfer or entry on the company's books is necessary to enable him to do so. Letters testamentary issued by a foreign court, properly exemplified are conclusive proof of the executor's title to the stock and of his right to vote in respect thereof.⁸

The Corporation act provides (§ 38) that shares of stock of a corporation belonging to said corporation shall not be voted upon directly or indirectly.

The statutory prohibition cannot be evaded by indirection. Thus where corporation A has acquired all the capital stock of corporation B, and at the time of such acquisition corporation B owned and held a large number of the shares of the capital stock of corporation A, the officers and directors of neither corporation have the right, at a stock-

5—*Matter of St. Lawrence Steamboat Co.*, 44 N. J. L. 529 (1882).

6—*Hankins v. Newell*, 75 N. J. L. 26 (1907); see also *State v. Crowell*, 9 N. J. L. 390 (1828).

7—*Corporation Act*, § 37. As to rights of pledgee, see *Canadian Improvement Co. v. Lea*, 74 N. J. Eq. 234 (1908).

8—*In re Election of Cape May, etc., Co.*, 51 N. J. L. 78 (1888).

holders' meeting of corporation A, held for the purpose of electing directors of that corporation, to vote upon the shares of the stock of corporation A held by corporation B at the time of the acquisition of its stock by corporation A; and the Court of Chancery will at the suit of a holder of stock in corporation A issue an injunction preventing both corporation A and corporation B from voting upon such shares.⁹

The statutory prohibition also extends to stock when pledged by the corporation as collateral to another corporation.¹⁰

59. VOTING TRUSTS AND AGREEMENTS.

A series of cases in the court of chancery and in the court of errors and appeals, commonly referred to as the "voting trust" cases, has established the principle that "every stockholder is entitled to the benefit of the judgment of every other stockholder in the management of the affairs of the corporation," and that agreements which sever the beneficial interest in stock from its voting power are in many instances a violation of this right which courts of equity will prevent by injunction.¹

In *Kreissl v. Distilling Company of America*² Chancellor Magie reviewed the previous cases as follows: "In *Taylor v. Griswold*, 2 Gr. 222, the supreme court, in dealing with the question of the reciprocal rights and duties of shareholders of private corporations, established the principle that the obligation and duty of incorporators to attend in person at meetings of the corporation and execute the trust or franchise reposed in or granted to them, is implied in, and forms part of, the fundamental constitution of every charter in which the contrary is not expressed. They thereupon denied the right of such corporation to authorize any stockholder to vote by any power of attorney or proxy, unless power to do so had been expressly or impliedly conferred by the legislature. This conclusion was reached on the avowed ground that by the association of the individuals in such corporation, each associate was expected to exercise his judgment upon all measures which he and his associates could take respecting the enterprise, which judgment his associates might assume would be favorable to his own interest and consequently beneficial to their interest. The power to judge and determine upon such measures could not, except under legislative authority, be delegated to another. Since the decision of the case referred to, the legislature has conferred upon stockholders of private corporations, created by special laws or under general statutes,

9—*O'Connor v. International Silver Co.*, 68 N. J. Eq. 680 (Court of Errors & Appeals, 1905).

10—*Thomas v. International Silver Co.*, 72 N. J. Eq. 224 (1907).

1—*Robotham v. Prudential Insurance Co.*, 64 N. J. Eq. 673 (1903); *Cone v. Russell*, 48 N. J. Eq. 208 (1891); *White v. Thomas Inflatable Tire Co.*, 52 N. J. Eq. 178 (1893); *Clowes v. Miller*, 60 N. J. Eq. 179 (1900); *Kreissl v. Distilling Co.*, 61 N. J. Eq. 5 (1900); *Chapman v. Bates*, 61 N. J. Eq. 658 (Court of Errors & Appeals, 1900).

2—61 N. J. Eq. 5 (1900).

the power to appoint a proxy to cast their votes. Notwithstanding this grant of legislative authority, questions have arisen as to the extent to which stockholders may confer authority upon proxies.

"The principle of that case has been applied in this court in the determination of causes involving such questions. If the present cause is essentially the same as those in which this court has already acted, I should feel it my duty to apply the same principle, even if I doubted its applicability, which I do not.

"In *Cone v. Russell*, 48 N. J. Eq. 208 (1891), Vice-Chancellor Pitney held void as against public policy, an agreement between stockholders of a private corporation, by which the owners of certain shares agreed with the owners of other shares to give the latter a proxy irrevocable for five years, and empower them to vote on the shares during that time, in consideration of which the latter parties agreed to so vote said shares as to procure the employment of one of the owners thereof as a manager of the corporation at a specified salary. This conclusion was reached notwithstanding the fact that relief by a declaration that the agreement was void was sought by one of the parties thereto, who was in *pari delicto*.

"In *White v. Thomas Inflatable Tire Co.*, N. J. Eq. 178 (1893), the same vice-chancellor had to deal with a case presenting the following facts: All the holders of the stock of a private corporation which had then been issued, entered into an agreement among themselves whereby their shares were transferred to a trustee, who issued to each stockholder an assignable trust certificate for the amount of his stock so transferred. By the agreement the trustee was required to so vote upon the shares that a majority of the directors should be elected upon the nomination of holders of certain certificates, being a minority of the whole number, and a minority of the directors should be elected upon the nomination of holders of certain certificates, being a majority of the whole number of such certificates. After discussing the question whether such an agreement could be sustained as to those entering into it, for a purpose which was declared to be proper, and pointing out the apparently insuperable difficulties in carrying out its provisions, the vice-chancellor found it unnecessary to decide its validity as to the parties to the agreement, while remaining the sole owner of the stock or the beneficial interest in the stock issued; but as to the complainant who had subsequently acquired shares of stock afterwards issued, and also some of the trust certificates representing original shares, he held that the agreement was unenforceable and void as contrary to public policy.

"Some expressions in these opinions have led to the contention that the vice-chancellor pronounced invalid any scheme or device by which the power to vote upon stock was separated from the ownership. That such was not his view is apparent from his language in *Cone v. Russell*, where he says: 'This conclusion does not reach so far as to necessarily forbid all pooling or combining of stock where the object is to

carry out a particular policy with a view to promote the best interests of all the stockholders; the propriety of the object validates the means and must affirmatively appear.' It is also apparent from the later decision of the same vice-chancellor in *Chapman v. Lee*, 46 Atl. Rep. 591,³ where a bill was filed to set aside a power of attorney and proxy made by the complainant, conferring upon defendant very extensive powers, and irrevocable for a specified period. The vice-chancellor held that the so-called proxies were included in an instrument which clothed defendant with ownership of complainant's stock with power to sell or exchange it, or to organize a new corporation, and in that case to accept stock therein in place of complainant's shares. It was held that defendant substantially became the owner of the stock as trustee for the complainant. Although the instrument did not set out the trust in detail, yet the court held that as such trust was set out in full in the answer, it could be taken as disclosing the purposes of the trust. Finding it established by the proofs that defendant had expended labor and money and had made contracts in reliance on the continued control of the stock, the vice-chancellor held that the agreement was not void and dismissed the bill.

"Under the statutes permitting stockholders to give proxies and under the doctrine of the cases in this court to which I have referred I conceive it is impossible to maintain that a proxy which confides to the attorney thereunder the power to exercise his judgment in certain cases, and so separates the voting power from the ownership of the stock, is void per se. The principle may, doubtless, limit the power conferred to voting on certain questions and in a certain way. But if, as is customary, the power is unlimited, it must be exercised by the judgment and determination of the attorney on any questions which may be presented.

"The power of revocation is deemed sufficient to protect the rights of other stockholders. If, however, the stockholder undertakes to make irrevocable his grant of power and to denude himself for a fixed period of the power to judge and determine and vote as to the proper management and control of the affairs of the corporation, then whether the grant of power is good or not must depend on the purposes for which it is given.

"When the scheme devised does not embrace a grant of irrevocable powers by proxy, but seeks a similar object by the creation of a trust and the appointment of a trustee, to whom the title of the stock is conveyed, a like doctrine must be applied. If no provision is made for the conduct of the trustee, at least he would be bound to vote on the stock held in trust in accordance with the expressed wishes of the cestui que trust; but if the transfer of the legal title to the stock is made and accepted under an agreement of the stockholder which deprives him of all power to direct the trustee, and all opportunity to

³—Affirmed sub nom. *Chapman v. Bates*, 61 N. J. Eq. 658 (Court of Errors & Appeals, 1900).

exercise his own judgment in respect to the management of the affairs of the corporation, then whether the transaction is open to the objection of other stockholders, as depriving them of the right they have to the aid of their co-stockholders, must be dependent upon the purposes for which the trust was created, and the powers that were conferred.

"If stockholders, upon consideration, determine and adjudge that a certain plan for conducting and managing the affairs of the corporation is judicious and advisable, I have no doubt that they may, by powers of attorney, or the creation of a trust, or the conveyance to a trustee of their stock, so combine or pool their stock as to provide for the carrying out of the plan so determined upon. But if stockholders combine by either mode to entrust and confide to others the formulation and execution of a plan for the management of the affairs of the corporation, and exclude themselves by acts made and attempted to be made irrevocable for a fixed period, from the exercise of judgment thereon, or if they reserve to themselves any benefit to be derived from such a plan to the exclusion of other stockholders who do not come into the combination, then in my judgment such combination and the acts done to effectuate it, are contrary to public policy, and other stockholders have a right to the interposition of a court of equity to prevent its being put into operation." ⁴

In *Cone v. Russell* the facts were as follows:

Complainants, as executors and trustees, held certain shares of stock in an incorporated company; defendants held certain other shares therein, which, added to those held by complainants, constituted a majority of all the shares. Complainants on the one part and defendants on the other entered into a contract by which complainants agreed to execute, and in pursuance thereof did execute, a proxy, irrevocable for five years, to defendants to vote at all stockholders' meetings upon the complainants' shares; and defendants, in consideration thereof, agreed to so vote said shares as that one of the complainants should be continuously employed as manager of the corporation, at a salary of twenty-five hundred dollars a year.

Vice-Chancellor Pitney held that the agreement was void first, because it was against public policy, and second, because it involved a breach of trust by complainants in stipulating for a salary for one of their number. He held also that complainants were entitled to relief against the defendants and an injunction against the use of the proxy, notwithstanding that they were *in pari delicto* with defendants.

"The theory upon which the capital of numerous persons is associated in various proportions in the shape of a trading corporation, to be managed by a committee of the stockholders, is that such committee shall truly represent and be subject to the will of the majority in interest of the stockholders. The security of the small stockholders is found in the natural disposition of each stockholder to promote the

⁴—*Kreissl v. Distilling Co. of America*, 61 N. J. Eq. 5 (1900).

best interests of all, in order to promote his individual interests. A member of an ordinary partnership has an additional security in the personal character of each of his partners, and may decline to be associated with any whom he does not know and approve. But a stockholder in a corporation cannot control the personnel of his associates and must rely upon their self-interest alone." ⁵

In *White v. Thomas Inflatable Tire Co.*, the holder of certain patents agreed with seven capitalists to form a stock company, whose capital stock should be divided into one hundred thousand shares, of which fifty-five thousand should be issued to him in payment for his patents to be assigned to the company, and twenty-eight thousand should be issued to the seven capitalists for cash to be advanced and used in exploiting the patents, and the remaining seventeen thousand shares should be held in the treasury for sale. They further agreed that all of the eighty-three thousand shares so to be issued, except enough to qualify directors, should be transferred to a trustee to hold for ten years, who should issue trust certificates to the holders, which should be assignable and transferable, and that the trustee should vote at elections of directors in such manner that the patentee should nominate and elect a minority of the directors, and the holders of the remainder of the stock should nominate and elect the majority. This being done, complainants purchased of the company the seventeen thousand shares of treasury stock and certificates were duly issued to them therefor. They also purchased from the patentee trust certificates for over fifty thousand shares, surrendered the same, and had new trust certificates issued to them. They thereby became the beneficial owners of a majority of all of the shares of the company. It was held that the trust agreement was void as against the complainants. ⁶

In *Kreissl v. Distilling Co. of America*, 61 N. J. Eq. 5 (1900), the voting trust agreement there under consideration, was held to be bad; first, because no plan of action was therein formulated or determined upon, but on the contrary, the formation of such a plan was expressly entrusted to the trustees and the committee; and secondly, because the agreement disclosed an intent to exclude the stockholders who did not enter into it from whatever benefits would be claimed thereunder. "This," said the chancellor "in my judgment, shows a combination contrary to public policy and one to which any non-assenting stockholder may object."

In *Chapman v. Bates*, the Court of Errors and Appeals said:

"There is no statutory provision, nor can we perceive any reason offensive to public policy, preventing a stockholder from giving another powers over, or rights in, his shares in a corporation to the same extent that he might give in any property. We recognize the principle laid down in *Cone v. Russell* and *White v. Thomas Inflatable Tire*

5—*Cone v. Russell*, 48 N. J. Eq. 208 (1891).

6—*White v. Thomas Inflatable Tire Co.*, 52 N. J. Eq. 178 (1893).

Co., that every stockholder is entitled to the benefit of the judgment of every other stockholder in the management of the affairs of the corporation, but in this case complaint is not made by one claiming that injury has been done to his interests by reason of a stockholder divesting himself of control of his stock, but by one of the very parties who has entered into this agreement and to which his consent has been given. He cannot complain of the injury done to his interests by this action, for he is a consenting party. Such arrangements, with regard to the control of stock, as contemplated in this proxy and power of attorney, and which have been denominated pooling agreements, are not necessarily void as being against public policy. In the case of *Cone v. Russell*, supra, the court, while holding the agreement in that case void as against public policy, expressly holds that 'this conclusion does not reach so far as to necessarily forbid all pooling or combining of stock, where the object is to carry out a particular policy, with a view to promote the best interest of all the stockholders. The propriety of the object validates the means, and must affirmatively appear.' The following are cases in which pooling agreements have been held valid: *Brown v. Pacific Mail & Steamship Co.*, 5 Blatchf. 525; *Smith v. San Francisco, etc., Railroad Co.*, 115 Cal. 584; S. C., 35 L. R. App. Cas. 309; *Mobile & Ohio Railroad Co. v. Nicholas*, 98 Ala. 92; *Hey v. Dolphin*, 92 Hun, 230.

"No illegal purpose is manifest upon the face of this agreement, nor has any been alleged in the bill. It appears to be consistent with the purposes for which the company was created, and whose continuance appears to be necessary for the advantage of all who are interested in the development of the property; it is expressly declared to be for the benefit of all who join in it. No stockholder is prevented from joining in this agreement, and no stockholder who has not availed himself of the opportunity to join in it is excluded from the benefit of it; no one appears to have been injured by it. The complainant does not allege in what way he is damaged by its continuance; he, with about four hundred out of five hundred stockholders, executed it, and he alone of all the stockholders asks to have it revoked. We do not think he should be allowed to revoke it."⁷

In *Warren v. Pim*,⁸ the voting trust in the stock of "The Fisheries Company," a New Jersey corporation, claimed by or on behalf of the "Pim committee" and "The Association of Foreign Shareholders of the Fisheries Company, Limited," a corporation of Great Britain, or either of them, was held to be contrary to the public policy of this state, inoperative, null and void.

In the case of *Warren v. Pim*, the following was the declaration of the trust upon which the shares were held:

"The deposited shares shall be held by the association upon trust

⁷—*Chapman v. Bates*, 61 N. J. Eq. 658 (Court of Errors & Appeals, 1900).

⁸—66 N. J. Eq. 353 (Court of Errors & Appeals, 1908).

that they may and shall according to the best of their discretion do the things following, that is to say:

"(1) Exercise all voting rights incident to the ownership of shares as and when the association shall think it expedient to exercise the same.

"(2) Receive all dividends and bonuses and other moneys receivable in respect of the deposited shares.

"(3) Raise or borrow on the security of the deposited shares any money required for the purposes of the execution of the trust.

"(4) Take all such actions and proceedings as they think expedient from time to time to protect the interests of the owners of the deposited shares."

Then further on follows a provision stating the duration of the trust:

"The trust shall be closed when one of the events following shall happen, that is to say—

"(1) When and so soon as the association by deed declare that it is to be closed; or

"(2) When the owners of three-fourths of the deposited shares of each class by notice in writing to the association declare the trust to be closed; or

"(3) When the last survivor of the now existing descendants of Her Majesty shall have been dead for twenty years; or

"(4) When fifty years from the execution hereof shall have elapsed."

Then follows, among others, a provision giving the association power to make an assessment upon the owners of the shares to pay the expenses of the association.⁹

In *State v. Atlantic City & Shore R. R. Co.*, 77 N. J. L. 465 (Court of Errors and Appeals, 1909) Chancellor Pitney said that in *Warren v. Pim*, "a majority of this court held that the voting trust under consideration was contrary to public policy, inoperative, null and void, and while the entire court approved of a decree that set aside the trust with respect to the shares of which certain of the complainants were the equitable owners, yet the differences of opinion in this court with respect to the grounds of the relief thus granted were such that none of the reported opinions expressed the view of a majority of the court upon any legal proposition involved in the case. Secondly, the question at issue in that case was the validity as against the complainants of a voting trust that had been attempted to be established by a majority in interest of the stockholders of the Fisheries company (a corporation of this state). The complainants, some of whom had purchased shares that were claimed to have been subjected to the trust, denied that their predecessors in title had in fact assented to become bound by its terms; they further asserted that the voting trust agreement, even if assented to in fact, was void in law as being contrary to the letter and policy of

⁹—*Warren v. Pim*, 65 N. J. Eq. 36 (1904).

the General Corporation act of this state, under which the Fisheries company was incorporated. The agreement provided that the nominal ownership of the 'trusteed' stock with the voting power, should be vested in a British corporation known as the 'Association of Foreign Shareholders of the Fisheries Company of New Jersey, Limited.' Some of the judges deemed that the legal validity of that agreement depended upon the question whether our General Corporation act permitted a British corporation such as the 'association' to hold stock in one of our corporations. It was not a question whether the British corporation was acting within the powers conferred upon it by Great Britain in assuming to exercise such ownership. Under its articles of association it clearly had this liberty. The question was whether New Jersey by its legislation had permitted the stock of a New Jersey company to be held and voted on by such a foreign corporation. Mr. Justice Dixon, in opening the discussion, alluded to the doctrine that one corporation cannot become a stockholder in another corporation unless authority therefor is clearly granted by statute, and at once proceeded to say: 'This doctrine presents two aspects; it brings into view both the law conferring power upon the corporation claiming to own the stock, and also the law subjecting the stock to ownership. The latter aspect is that now chiefly to be regarded.' "

60. CUMULATIVE VOTING.

A statute enacted in 1900, provides that the certificate of incorporation, original or amended, of any corporation now or hereafter organized under the laws of this state and thereunder issuing or authorized to issue shares of its capital stock, may provide that at all elections of directors, managers or trustees, each stockholder shall be entitled to as many votes as shall equal the number of his shares of stock multiplied by the number of directors, managers or trustees to be elected, and that he may cast all of such votes for a single director, manager or trustee or may distribute them among the number to be voted for, or any two or more of them as he may see fit, which right, when exercised, shall be termed cumulative voting.

The act further provides that this act shall not be construed as affecting in anywise the determination of whether or not the right of cumulative voting has been heretofore granted by implication or the right of cumulative voting, if any, granted specifically by special charter or certificate of incorporation.¹

In *Loewenthal v. Rubber Reclaiming Company*,² Vice-Chancellor Pitney held that a by-law, providing for cumulative voting, adopted as a part of the organization of the company was valid.

1—An act to provide in terms for cumulative voting in corporations issuing or authorized to issue shares of capital stock, P. L. 1900, p. 418.

2—52 N. J. Eq. 440 (1894).

61. LIABILITY OF STOCKHOLDERS AT COMMON LAW; THE TRUST FUND DOCTRINE.

At common law a stockholder was not liable for the debts of the corporation. He was liable to pay for his subscription when it was necessary to discharge the debts of the company, but it was a liability to the company or its legal representative. Personal liability of stockholders of a corporation for a debt contracted by the corporation is inconsistent with the idea of a body corporate at common law, and can arise only out of some statutory provision.¹

The trust fund doctrine is supposed to be based upon the decision of Justice Story in *Wood v. Dummer*, 3 Mason, 308, 30 Fed. Cas. No. 17,944 (1824). The stockholders of a bank, for the purpose of liquidating its affairs, divided the capital without reserving sufficient to pay the debts, and the right of recovery was placed expressly on the ground that the capital stock being a trust fund might be followed by the creditors into the hands of any persons having notice of the trust attached to it, and that as to the stockholders themselves, there could be in the case no pretense to say that both in law and in fact they were not affected with the most ample notice. Justice Story held that, under the charter of the company, the capital stock was a trust fund for the creditors, and that the stockholders, upon the division, took it subject to all equities attached to it, as impressed with the trust and *cum onere*.

The doctrine was recognized by the United States Supreme Court in *Sawyer v. Hoag*, 17 Wall. 610, 620 (1873). In this case, Sawyer, having subscribed for \$5,000 of stock in a company, undertook to pay for it by giving to the company his check for the full amount, taking back, at the same time, the company's check for \$4,250, for which latter amount he gave his note to the company, payable in five years, with good collateral security. Mr. Justice Miller, who delivered the opinion, said *arguendo*, that this transaction, if nothing unfair was intended, was one that the parties could do effectually, so far as they alone were concerned, and he said: "In any controversy which might grow out of the matter between the company and Sawyer we are not prepared to say that the company, as a corporate body, could deny that the stock was paid in full." The company having become insolvent, however, it was held that Sawyer was liable to pay the note in money as representing the balance of his unpaid subscription, the court denying his right to set off a claim against the company that he had bought from another creditor.

The case of *Scovill v. Thayer*, 105 U. S. 143 (1881), is a clear illustration of the relation of the "trust fund theory" to the more positive rules of law that depend upon express statutory enactments. Here a corporation, organized under the laws of the State of Kansas, had commenced with \$100,000 capital, and had undertaken to successively increase its capital—first, to \$200,000; then to \$300,000, and afterwards to \$400,000.

1—*Salt Lake City Nat. Bank v. Hendrickson*, 40 N. J. L. 52 (1873); *Thompson-Houston Electric Co. v. Murray*, 60 N. J. L. 20 (1897).

Thayer, who held stock of each of the first two issues, attended, by proxies, the meetings of the stockholders at which the third and fourth issues were voted, and he became a holder of a part of each of those issues. None of his stock was paid up by him in full, and the company having become insolvent, the assignees in bankruptcy petitioned for an assessment against the stockholders, including Thayer. He insisted—first, that the third and fourth issues of stock, having been made in excess of the limit of capital prescribed by the laws of Kansas, were absolutely void, and that no assessment could be made against him by reason of his holding shares of those issues; and secondly, that the sums voluntarily paid by him upon his void stock should be applied to the payment of the balance due upon his valid stock. The court held that the third and fourth issues were in excess of the limit prescribed by law and therefore void, and that notwithstanding Thayer's assent to those issues, and the fact that after such increase the company had held itself out as possessing a capital of \$400,000, and invited and obtained credit on the faith of such representations, he was not estopped from denying the validity of this stock and his obligations to pay for it in full. With respect to his valid stock, it appeared that by the agreement between him and the company he was not to be called upon to pay any further assessments upon it, the same contract being made with all the other shareholders and the fact being known to all. The court held that as between them and the company this was a valid agreement, since it was "not forbidden by the charter or by any law or public policy," but held that he was liable to the assignee in bankruptcy, as the representative of the creditors.

In *Coit v. North Carolina Gold Co.*, 14 Fed. Rep. 12 (1882); affirmed, 119 U. S. 343 (1886) Mr. Justice Bradley, sitting in the circuit court, held that where for the purchase of additional property the capital of the company had been increased by the issue and distribution of new stock to a much larger extent than the cost or value of the property, the stockholders could not be held individually liable at the suit of a creditor who was cognizant of the whole transaction and acquiesced in it. The decision was affirmed by the supreme court, Mr. Justice Field delivering the opinion, saying (119 U. S., at p. 347); "The plaintiff had placed no reliance upon the supposed paid-up capital of the company on the increased shares, and therefore has no cause of complaint by reason of their subsequent recall. Had a new indebtedness been created by the company after the issue of the stock and before its recall, a different question would have arisen. The creditor, in that case, relying on the value of the stock being fully paid, might have insisted upon its full payment. But no such new indebtedness was created, and we think, therefore, that the stockholders cannot be called upon, at the suit of the plaintiff, to pay in the amount of the stock which, though issued, was soon afterwards recalled and cancelled."

In *Clark v. Bever*, 139 U. S. 96 (1891), in a case of somewhat similar character, the same principle was applied.

In *Handley v. Stutz*, 139 U. S. 417 (1891), it was held that when a stockholder who assents to an increase in the capital stock and its gratuitous distribution among the shareholders receives such stock as full-paid stock, an obligation arises to pay for it in full when called upon to do so by creditors, whose debts are subsequent to the authorization of the increase, but that this equity does not exist in favor of a creditor whose debt was contracted prior to such authorization and this on the ground that prior creditors could not be presumed to have trusted the company upon the faith of the increased stock.

Dickerman v. Northern Trust Co., 176 U. S. 181, 203 (1900) (a case arising under the New Jersey Corporation act of 1875), contains a dictum by Mr. Justice Brown to the effect that as between the corporation and its stockholders a declaration upon the face of the certificate that the shares are fully paid and unassessable is binding, although untrue.

In *Rickerson Roller Mill Co. v. Farrell*, 75 Fed. Rep. 554, 560 (1896), it was held that "in the absence of statutory or charter provisions" a corporation may agree with a subscriber to its stock to receive less than the par value therefor, and that a creditor of the company who becomes such with knowledge of such an agreement cannot require the subscriber, upon the insolvency of the corporation, to pay his stock in full.

In *First National Bank v. Gustin, etc. Mining Co.*, 42 Minn. 327 (1890), the supreme court of Minnesota had to do with the individual liability of a shareholder in a corporation organized under the laws of Dakota. The code of Dakota provided that each stockholder should be individually liable for the debts of the corporation to the extent of the amount that was unpaid upon the stock held by him, but seems to have contained no express prohibition against the issuance of stock for less than its par value. It was held that where a corporation, with which a creditor had dealt with knowledge that its nominal paid-up capital was not in fact paid, issues new shares after the claim of the creditor arises, he has no right to insist upon a contribution from the holders of those shares. Justice Mitchell said: "The whole doctrine that the capital stock of corporations is a trust fund for the payment of creditors rests upon the equitable consideration that the distribution of the capital among stockholders, without making adequate provision for the payment of debts, or the issue of fictitiously paid-up stock, is a fraud upon creditors who contract with the corporation in reliance upon its capital remaining intact, or in reliance upon the professed capital having been in fact paid up in full. But when the reason for the rule does not exist, the rule itself ceases to apply."

In *Hospes v. Northwestern Manufacturing Co.*, 48 Minn. 174 (1892), (another decision by the same judge), the corporation in question was organized under the laws of Minnesota. It was held that if stock is issued by such a corporation upon a contract that it shall not be paid for, its creditors cannot recover payment for such stock on account of the implied promise of the persons receiving it that such payment will

be made. The opinion contains an interesting criticism of the "trust fund doctrine," resulting in what seems to be its virtual repudiation. As showing, however, that the doctrine, where recognized, must give place to an express statutory provision, the following excerpt from the opinion is instructive: "In England, since the act of 1867, there is an implied contract created by statute that 'every share in any company shall be deemed and be taken to have been issued and to be held subject to the payment of the whole amount thereof in cash.' This statutory contract makes every contrary contract void. Such a statute would be entirely just to all, for everyone would be advised of its provisions and could conduct himself accordingly. And in view of the fact that 'watered' and 'bonus' stock is one of the greatest abuses connected with the management of modern corporations, such a law might, on grounds of public policy, be very desirable. But this is a matter for the legislature, and not for the courts. We have no such statute."

Having thus considered the foregoing cases, Mr. Justice Pitney, in a recent case said: "We do not wish to be understood as assenting to the reasoning of the foregoing cases so far as they debar from recourse to the stockholder's liability those creditors whose claims accrued before the stock issue in question, and those subsequent creditors who extended credit to the company with knowledge that the stock was issued as full paid when it was not full paid in fact. With respect to prior creditors, the query arises, Why may they not resort to after-acquired property of the company, and as well stock subscriptions as more tangible assets? With respect to subsequent creditors, the query is, Why, if they knew the stock issued as full paid was not full paid in fact, may they not be justified in dealing with the very stockholder's liability thus arising as a part of the assets of the company for the purpose of satisfying creditors' claims? But without spending time in discussion of these questions, we content ourselves with saying that our Corporation Act places the stockholder's liability to creditors upon a firmer foundation than the 'trust fund doctrine' as expounded in the above cases, the statute absolutely prohibiting agreements for the issue of stock for a consideration less than its par value, and affording relief to all creditors without distinction."²

"The 'trust fund theory' has been repeatedly adopted by the courts of this state to the extent that it deals with the capital stock paid in or subscribed for as a fund for the payment of debts of which the directors are trustees, so that they cannot dispose of it to the prejudice of creditors without an equivalent consideration, nor defeat the trust by accepting any simulated payment of a stock subscription, or by any other device short of actual payment in good faith."³

"But so far as this so-called 'trust fund doctrine' excludes any credit-

2—Pitney, J., in *Easton National Bank v. American Brick, etc., Co.*, 70 N. J. Eq. 722 (Court of Errors & Appeals, 1906).

3—*National Trust Co. v. Miller*, 33 N. J. Eq. 155, 163 (1880); *Wetherbee v. Baker*, 35 N. J. Eq. 501, 512 (Court of Errors & Appeals, 1882); *Bickley v. Schlag*, 46 N. J. Eq. 533, 537 (Court of Errors & Appeals, 1890).

ors from relief against the stockholders, it does so on the theory that the liability of the latter rests alone upon their having held out the capital of the company to persons extending credit to it as the source from which repayment might be expected. If this be the only foundation of the stockholder's liability, it is perhaps not irrational to debar creditors whose claims accrued prior to the stock issue in question, and subsequent creditors who had notice when they extended credit that the stock issue did not represent in whole or in part what it purported to represent—that is, an equivalent amount in value added to the assets of the company.

“But in this state the stockholder's liability to creditors does not depend alone or chiefly upon the theory of “holding out.” It depends upon the stockholder's voluntary acceptance, for consideration touching his own interest, of a statutory scheme to which watered stock, under whatever device issued, is absolutely alien, and which requires stock subscriptions to be made good for the benefit of creditors of insolvent companies, without distinction between prior and subsequent creditors, or between creditors who had notice and those who had none. The corporation now under consideration was organized in 1886, under the General Corporation act of New Jersey as it then stood—that is, the act of 1875 and its supplements. (Rev. 1877 p. 175; 1 Gen. Stat. p. 907.) Section 5 of this act declares that “where the whole capital of a corporation shall not have been paid in, and the capital paid shall be insufficient to satisfy the claims of its creditors, each stockholder shall be bound to pay on each share held by him the sum necessary to complete the amount of such share, as fixed by the charter of the company, or such proportion of that sum as shall be required to satisfy the debts of the company.” Section 54 declares: “That nothing but money shall be considered as payment of any part of the capital stock of any company organized under this act, except as hereinafter provided for the purchase of property, and no loan of money shall be made to a stockholder or officer therein,” etc. Section 55 provides for the issuance of stock for property purchased, to the fair value of such property, but as it has already been determined that this section was not complied with in the present case, it need not be quoted here. Other sections (7, 33, 53, etc.) contain provisions intended to prevent the withdrawal by stockholders, directly or indirectly, of any part of the capital stock to the detriment of creditors. The express prohibition of section 54 and the whole spirit and policy of the act are so clearly opposed to any arrangement by which corporate stock shall be issued without receipt by the company of an equivalent in value to its par that any agreement to this effect must be deemed void as contrary to the policy of the law. If any doubt has existed upon this question it must be taken as settled by the decision of this court in *Volney v. Nixon*, 68 N. J. Eq. 605.”⁴

4—Pitney, J., in *Easton National Bank v. American Brick, etc., Co.*, 70 N. J. Eq. 722 (Court of Appeals & Errors, 1906). See also *Johnson v. Tennessee Oil, etc. Co.*, 74 N. J. Eq. 32 (1908).

62. STATUTORY LIABILITY OF STOCKHOLDERS.

The Corporation Act now provides (§ 21) that where the whole capital of a corporation shall not have been paid in, and the capital paid shall be insufficient to satisfy its debts and obligations, each stockholder shall be bound to pay on each share held by him the sum necessary to complete the amount of such share, as fixed by the charter of the corporation, or such proportion of that sum as shall be required to satisfy such debts and obligations.

Section 48 provides that "nothing but money shall be considered as payment of any part of the capital stock of any corporation organized under this act except as hereinafter provided in case of the purchase of property."

Section 49 authorizes any corporation to purchase property necessary for its business and to "issue stock to the amount of the value thereof in payment thereof," and then provides that "the stock so issued shall be full paid stock and not liable to any further call, neither shall the holder thereof be liable for any further payment under any of the provisions of this act; *and in the absence of actual fraud in the transaction the judgment of the directors as to the value of the property purchased shall be conclusive.*" The words in italics are new in the Revision of 1896.

During the past few years there have been several decisions in New Jersey as to the liability of stockholders in cases where stock has been issued for property purchased at an excessive valuation. These decisions are of grave importance in that they hold that the judgment of the directors as to the value of such property is not conclusive, and that such judgment may be set aside by the courts in insolvency proceedings, and a personal liability imposed upon the holders of the stock where it is shown that the property was overvalued. Pursuant to this statute, it is probable that hundreds of millions of dollars of stock have been issued in payment of property purchased at an excessive valuation. Are the holders of such stock liable, in case of insolvency of the corporations, to pay up the difference between the par value of their shares and the amount of the actual value of the property as determined by the court? Apparently they are so liable unless they purchased their stock in the open market without notice of the overvaluation.

The first case of importance since the Revision of 1896, although it involved the construction of the law as it existed prior to the revision, was *See v. Heppenheimer*, 69 N. J. Eq. 36 (1905). The facts, briefly stated, were that three gentlemen, who were held by the court to be promoters of the enterprise, conceived the plan of combining a large number of mills manufacturing straw paper into a single corporation under the New Jersey act. With that end in view they secured options to purchase certain mills for about \$2,500,000, the purchase price in each case being payable partly in cash and partly in stock of the corporation to be organized. The promoters then caused the mills to be sold to the corpo-

ration for \$5,000,000, payable as follows: \$1,000,000 in bonds, \$1,000,000 in preferred stock and \$3,000,000 in common stock. The promoters attempted to justify this issue on the ground that the good will of the combined mills was property of a value sufficient to make up the difference between the price at which the original vendors sold their mills and the price paid by the new corporation. The board of directors of the new corporation, which authorized the purchase and the issue of bonds and stock, was composed largely of employees of the promoters. At the time of the organization of the new corporation, and in order to enable them to raise the cash necessary to pay the vendors, the promoters offered the bonds for sale at par with a bonus of stock, and after delivering the necessary stock to pay off the vendors as provided by the options, over \$1,000,000 in stock remained, which was divided among the promoters. This was not an uncommon method of promoting large companies. In fact the promoters urged this common practice as a defense in a suit brought by the receiver of the corporation, appointed in insolvency proceedings, to hold them personally liable on their stock. Vice Chancellor Pitney disposed of this defense and stated his view of the case in the following vigorous language:

"But the defendants say: The practice of so valuing property under our statute has been indulged in frequently before, and numerous corporations have been organized and have existed upon such a basis, so that (they argue), the practice has become well-nigh crystallized and sanctioned by long usage. I am sorry to feel constrained to admit that this practice has been frequently indulged in, and, further, that it has brought obloquy upon our state and its legislation. But I am happy to be able to assert with confidence that such practice is entirely unwarranted by anything either in our statute or in the decisions of our courts, and whenever it has been indulged in it has involved a clear infringement of, if not a fraud upon, the plain letter and spirit of our legislation. So far from approving these transactions our Court of Errors and Appeals has recently * * * made a decision and rendered an opinion in which it disapproves of these inflated transactions in the most emphatic and practical manner. I allude to the case of *Volney v. Nixon*, reported in 60 Atl. 189, the opinion in which I have had opportunity to examine, the headnote of which is as follows: 'A contract between two persons, that in exchange for their joint property one of them shall procure from a corporation of this state an original issue of stock to an amount known by all parties to be in excess of the value of the property and shall divide the stock thus procured with the other person, is illegal; and the courts of this state will not aid in its enforcement, even though the objectionable feature has been accomplished by the actual issue of the stock.' In the course of the opinion the learned Judge Dixon remarks: 'It must be remembered that under the laws of New Jersey the stock of the corporation can be originally issued for property purchased only to the amount of what is honestly deemed by the directors the value of the

property.' Referring to *Donald v. Smelting Co.*, 62 N. J. Eq. 729, 48 Atl. (Court of Errors and Appeals, 1901).

"But, say the defendants: 'We acted in perfectly good faith. We really believed this property was worth the amount at which it was appraised, and we were guilty of no fraud in that behalf. And to show our good faith we invested therein several hundred thousand dollars (\$467,000) in cash, besides \$50,000 in services and expenses of the law firm of Gugenheimer & Untermeyer and their correspondents in Chicago, and have lost it all.' And a powerful appeal was made to the court not to subject the defendants to further loss by saddling these enormous debts upon them. Let us consider the affair from the standpoint of the defendants, and inquire just how and for what they invested their money. The real estate and good will of the 39 mills footed up in value, for purposes of sale to the corporation, to nearly \$2,200,000, and, after allowing for the overvaluation which we all know that the individual owners of these industrial properties about to be united usually manage to maintain for that purpose, and of which there is some proof in this case, we may reasonably suppose to be worth \$1,500,000, and thus to furnish reasonably good security for \$1,000,000 of bonds. Hence it was reasonably safe to invest at par in the bonds to the extent of \$1,000,000, secured by a mortgage upon the property. There was little reason to anticipate the completeness of the final catastrophe. The cause of that completeness I have already stated. Now, that investment at par in 6 per cent. bonds secured by a mortgage on property worth at least one and one-half times the amount of the sum secured is all that any of the defendants risked. Not one dollar was invested by any of them beyond the par value of the mortgage bonds of the company. For every \$1,000 paid into the company they received a mortgage bond for that amount, and, besides, a bonus of two shares of preferred and four shares of common stock. It is thus made clear that, when the faith of these investors in the value of the property purchased was put to the actual test, it went no further than to invest at par in first mortgage 6 per cent. bonds, secured by property estimated to be worth about twice the amount of the mortgage, to which bonds was added as a bonus 60 per cent. of stock representing the value of the property above the mortgage. This transaction is known in the language employed in these financial transactions as 'getting in on the ground floor,' and was so understood by each of the investors. Mr. Heppenheimer, in fact, uses this very language in his evidence. In answer to a question put by me as to whether he 'did not think Mr. Untermeyer was making you a big present,' he replied: 'No; he was not making me any present, but letting me in on the ground floor. That is the way all these corporations have been formed in the state of New Jersey.' No doubt each of these investors really, and therefore in good faith, hoped and expected that the enterprise would prove what they called a success; that is, that the bonds were entirely safe, and so, probably, was the preferred stock. And in like manner it was hoped and expected that the common stock would receive periodical divi-

dends for a period of time long enough at least to enable some, if not all, of it to be marketed, or, to use the apt phrase which has been applied to such transactions, 'to be distributed to,' and later to be 'digested by the public.'

"I am able to find that the defendants' belief and faith went beyond this. But I am unwilling to adopt the notion that this sort of good faith is that which is required in order to legalize transactions like this under consideration. And here we find the real motive and reason which gives rise to these inflated values and 'watering' of capital stock. It is the desire and intention to sell shares in a property owned by the corporation, for that is what capital stock represents, for more than they are really worth. And therein lies the intrinsically fraudulent character of these transactions. I feel justified in so characterizing them since the overvaluation of the property does not at all or in any manner increase its intrinsic or practical value, or in the least degree promote the real prosperity of the enterprise. A single paper mill will turn out just as much product capitalized at \$100,000 as \$200,000, and its rental value will be practically the same. The earnings and profit due to good management and skillful handling of the product will be the same, and these last do not depend at all upon the producing capacity of the mill. Finally, the division of the profits, if any there be, among the stockholders will be on the same basis, and the amount received by each stockholder will be the same, the only difference being in the percentage of the division, and the market values of the shares will finally settle down to the gauge of the dividends earned and declared. But this straightforward mode of doing business does not satisfy the present-day promoter, whose object in making an overvaluation is twofold: First, to sell shares at more than their real value, and thereby secure a profit immediately in hand ('profit' is the word used by Mr. Samuel Untermyer in his evidence); second, to obtain mercantile credit based on a large capital.

"A large number of authorities in apparent support of inflated values for purposes of capitalization, from different states in the union, were cited by counsel for defendants. I shall not stop at this moment to discuss their value in this state and in this connection, because I find the law laid down in this state under this statute by the court of errors and appeals in the very recent case, cited by the defendants, of *Donald v. American Smelting Co.*, 62 N. J. Eq. 729. That case arose under the act of 1896, in which the language of the governing section (section 49) is more liberal than the corresponding section of the act governing the present case, in that it has added the words, 'and in the absence of actual fraud in the transaction, the judgment of the directors as to the value of the property purchased shall be conclusive.' That, indeed, was a suit by a stockholder in a corporation, already organized and engaged in its legitimate business, to restrain an issue of stock in payment of additional property to be purchased, but the rule laid down by the learned judge who spoke for a majority of the court,

applies with equal, and I think greater, force to the present case, where creditors are asking for payment of their just debts. After quoting section 48, and a portion of section 49 of the act of 1896, he proceeds: "The meaning of section 48 is not questionable. The money must equal the face value of the stock. * * * The distinction between the contemplated issue of corporate stock for property and its issue for money lies not in the rule for valuation, but in the fact that different estimates may be formed of the value of property. When such differences are brought before judicial tribunals, the judgment of those who are by law entrusted with the power of issuing stock 'to the amount of the value of the property,' and on whom, therefore, is placed the first duty of valuing the property, must be accorded considerable weight, but it cannot be deemed conclusive when duly subjected to judicial scrutiny. Nor is it necessary that conscious overvaluation or any other form of fraudulent conduct on the part of those primary valuers should be shown to justify judicial interposition. Their honest judgment, if reached without due examination into the elements of value, or if based in part upon an estimate of matters which really are not property, or if plainly warped by self-interest, may lead to a violation of the statutory rule as surely as would corrupt motive. The cases in this state to which we are referred [citing cases] in support of the proposition that the honest judgment of the managers of a corporation with respect to matters *intra vires*, cannot be disturbed at the instance of stockholders, all relate to transactions for which the legislature has set up no other criterion than the discretion of those managers. *But the original issue of corporate stock is a special function, in the exercise of which the legislature has fixed the standard to be observed, and it is the duty of the courts, so far as their jurisdiction extends, to see that this standard is not violated, either intentionally or unintentionally.*" This language, as I understand it, contains the very *ratio decidendi* of the case then under consideration, and is, therefore, binding on me, even if I did not concur in it, which I do most heartily. The intention of the legislature expressed in these sections in question, in my judgment, manifestly was, that the capital stock of all corporations should at the start represent the same value whether paid for in property or money. That result can only be obtained by supposing that the property is to be appraised at its actual cash value, precisely as if a board of directors with the whole capital stock actually paid in cash is dealing at actual 'arms' length' as real purchasers with the owner of property proposed to be purchased as a real vendor without any interest in the directors to overvalue the property or other interests inconsistent with the real interest of the stockholders as such. I say 'at the start,' because we all know that property purchased in good faith for cash is liable afterwards to depreciate in value owing to circumstances not foreseen at the time of its purchase. After all, it seems to me that the true test, under this statute, as applied to the case here in hand, is this: if the company actually had to its credit

in the bank the sum of \$5,000,000 would it have been willing to have paid that price in cash for the property in question for the uses and purposes to which it proposed to devote it; would the property be worth that sum in cash to the company?"¹

Accordingly the promoters, and also certain other persons who had taken the bonus stock with bonds were held to be personally liable on their shares. No appeal was taken from this decision.

In a more recent case in the Court of Errors and Appeals (*Easton Nat. Bank v. American Brick & Tile Co.*, 70 N. J. Eq. 732), after discussing certain decisions of the courts on the "trust fund doctrine," (see section 61 above) the court said (Mr. Justice Pitney writing the opinion):

"But without spending time in discussion of these questions, we content ourselves with saying that our corporation act places the stockholder's liability to creditors upon a firmer foundation than the 'trust fund doctrine' as expounded in the above cases; the statute absolutely prohibiting agreements for the issue of stock for a consideration less than its par value, and affording relief to all creditors without distinction."

In a still more recent case in the Court of Chancery decided in November (*Honeyman, Receiver, v. Haughney et al.*, 66 Atl. 582 [1906]), which arose under the present law, the facts were as follows:

The corporation was organized with an authorized capital stock of \$1,000,000, all of which with \$125,000 of first mortgage bonds, was issued in payment of a manufacturing property and business and four letters patent. It was shown that two of the directors had obtained an option to purchase the entire property for \$125,000. The court held that there was such gross overvaluation as to constitute actual fraud, Vice-Chancellor Bergen saying (orally):

"How a proceeding of this kind can be sanctioned by this court I can't see. The principle is well established that the capital stock of a corporation is a trust fund for the payment of its creditors. Creditors dealt with this corporation on the assumption that it had available assets to the amount of its capital stock, which was \$1,000,000. This was not true. Persons who trusted the concern did so on the theory that its officers had fulfilled their duty and that the stock was paid in. They are therefore entitled to call upon the stockholders to pay a sum sufficient to enable them to collect the amounts of their respective claims.

"The corporation laws of this state are liberal—just as liberal as they should be—and the courts are not disposed to add to the elasticity of the corporation act. Incorporators must either advance money or money's worth. This is a perfectly clear case of an issue of stock for property at a gross overvaluation, and the complainant is entitled to a decree directing that the contract setting forth that the defendant com-

1—Pitney, V. C., in *See v. Heppenheimer*, 69 N. J. Eq. 36 (1905). See also *Strickland v. National Salt Co.*, 76 Atl. 1048 (1910).

pany's stock was full paid be set aside, for it was a fraud—it never was paid—and empowering the receiver to collect a sufficient sum to pay the debts and expenses of administration.”

In *See v. Heppenheimer* it was also held that the fact that a purchaser of bonds of a corporation entered into an agreement with the company that for each \$1,000 in cash subscribed, a mortgage bond for \$1,000 and a bonus of \$600 of stock in the company in process of formation should be delivered to him was sufficient to put him on inquiry as to whether the stock so issued had been paid for either in cash or in its equivalent in property, and that he was liable to creditors thereon.²

An agreement between a corporation, organized under the General Corporation act of 1875, and its stockholders, to the effect that corporate stock shall be issued to them without receipt by the company of money or property equivalent in value to the par value of the stock, is void because contrary to the spirit and policy of the act.³

In the *American Brick Company* case Mr. Justice (now Chancellor Pitney, said: “Upon the hearing an attempt was made to show that in the estimation of individual directors the patents had a prospective value even as high as \$1,000,000. No minute or other formal record of any action taken by the directors or by the stockholders with respect to the issuance of the stock was produced, and the proof mainly relied upon to show action by the directors was the testimony of Judge Paxson and Messrs. Wilbur and Potter, Judge Green having died some time before. As might be expected after the lapse of seventeen years since the transactions in question, the memories of the witnesses were quite uncertain and their testimony exceedingly indefinite. Without rehearsing the evidence, we content ourselves with saying that we agree with the conclusion of the learned vice-chancellor that no official action was taken by the board of directors, and that, with the exception of informal meetings and general conversations with Judge Green, the negotiations with the patentees were confided entirely to the latter with the exception on the part of the present appellants that in some way he would arrange matters so that, in exchange for the \$10,000 each had advanced, or agreed to advance, stock would be issued to them of the par value of \$150,000 each. There is no doubt that at the inception of the company the appellants were very sanguine of its ultimate success, and believed that in future the company might develop an earning capacity proportionate to its capitalization of \$1,000,000, but in view of all the circumstances, including the terms of the purchase from Simpson and Canfield, it is impossible to believe that these eminent and highly respectable gentlemen did, upon their responsibility as directors, resolve that the patents were presently worth in money \$800,000 or \$1,000,000, or anything approaching those sums. They were

²—*See v. Heppenheimer*, 69 N. J. Eq. 36 (1905).

³—*Easton National Bank v. American Brick, etc., Co.*, 70 N. J. Eq. 732 (Court of Errors & Appeals, 1906). See also *Johnson v. Tennessee Oil, etc., Co.*, 74 N. J. Eq. 32 (1908).

aware of the terms of the agreement of March 12th, 1886, by which Simpson and Canfield, the absolute owners of the patents, agreed to part with them to the company in exchange for \$5,000 in cash and a minority interest in the company, whose entire assets would consist of the patents themselves and \$20,000 in money. We also agree with the view of the vice-chancellor that if we were to accept the claim of the appellants that the directors did determine to issue all the stock in question for the patents, it would result that the proceeding must be considered a mere device on the part of the directors to evade the letter and spirit of the Corporation act, to accomplish which the patents were intentionally overvalued. In this view the credit to be given to the stockholders by reason of the transfer of the patents to the company must at least be limited in the present proceeding to the fair value of the patents. Whether for this purpose we should accept the value of these as subsequently demonstrated (which is practically nil), or rather such value as might reasonably have been assigned to them at the time, need not be determined, for a reason that will presently appear. The appellants have not presented their proofs in such manner as to enable the court to determine, with any accuracy, the fair value of the patents at the time they were transferred to the company. Assuming, however, that they were worth \$50,000 at the outside (the proofs will not support so high an estimate), the amount left unpaid (after due credit for cash payments also) upon the stock issued to each of the appellants would far exceed the entire amount of the debts of the company. Counsel have not referred us to any evidence showing how or when the directors authorized the stock certificates to be stamped "issued for property purchased." Nor have we, in our examination of the record, discovered any such evidence. We are inclined to think that it was done, just as many other things respecting the organization and business of the company were done, without formal authorization and without any clear understanding of its legal effect. Nor can Messrs. Green, Paxson, Wilbur and Potter be considered as being in any legitimate sense vendors of the patents to the company at the price of the large block of stock that was issued to them. They were promoters of the company, Paxson, Wilbur and Potter being in effect assignees under Judge Green of a part of his interest in the Simpson and Canfield contract, having full notice of the entire transaction. The whole of the evidence, including the terms of the agreement of March 12th, 1886, itself, convinces us that the only stock that was issued for the patents was that which went to Simpson and Canfield, and that the only consideration for the stock issued to the others was the moneys paid in by them to the company." ⁴

In *Donald v. American Smelting, etc., Co.*, 62 N. J. Eq. 729 (Court of Errors and Appeals, 1900), Mr. Justice Dixon said: "When corporate stock has once been issued for property purchased, then the legislature

4—*Pitney, J.*, in *Easton National Bank v. American Brick, etc., Co.*, 70 N. J. Eq. 732 (Court of Errors & Appeals, 1906).

has directed the application of a different rule. In the words of the same section 49, 'the stock so issued shall be full-paid stock, and not liable to any further call, neither shall the holder thereof be liable for any further payment under the provisions of this act; and in the absence of actual fraud in the transaction the judgment of the directors as to the value of the property purchased shall be conclusive.' Under these provisions, after the property has been purchased and the stock issued therefor, nothing short of actual fraud in the transaction can impair the right of the holder to hold his stock as full-paid stock, free from further call. The cases of *Bickley v. Schlag*, 46 N. J. Eq. 533 (Court of Errors and Appeals, 1890), and *Rural Homestead Co. v. Wildes*, 54 N. J. Eq. 668 (1896), indicate that the completed transaction was equally secure, even before the statute received its present decisive form." In *See v. Heppenheimer*, however, Vice-Chancellor Pitney declared that the foregoing statement was mere dictum. There has been no decision of the Court of Errors and Appeals as to the effect of the clause that "in the absence of actual fraud in the transaction the judgment of the directors as to the value of the property purchased shall be conclusive." It is worthy of comment, however, that this clause was inserted by the Revisers in the draft of the bill which was enacted as the Revision of 1896, as they stated in their report to the legislature, as declaratory of the rule stated by the Court of Errors and Appeals in *Bickley v. Schlag*, 46 N. J. Eq. 533 (1890). In the opinion in that case Chief Justice Beasley said:

"If we were to assume that this procedure [a suit by a single creditor, suing in his own behalf, and not a general creditors' bill] had any legal foundation whatever, the fact would still remain, that the real question presented by it has neither been considered nor decided. In view of the proofs in the case, it was not and could not be disputed that the stock in question, as between these stockholders and the corporation, had been paid for in full; for they had transferred to the company, in satisfaction for it, certain steamboats and other property, each share so purchased being marked with the words 'issued for property purchased.' Consequently, so long as this contract of sale subsisted, an indisputable title to the stock existed in the stockholders, and it was also thereby conclusively established that they were in nowise indebted to the company by reason of their purchase. The inquiry, therefore, in the court below, should have been, whether the agreement in question was fraudulent or not; for, if the transaction was an honest one, the difference in value between the property constituting the consideration of the sale and the stock had no legal significance. The charter of this company authorizes the corporation to exchange its capital stock for property, and, under that condition of things, a court of equity cannot set aside a transaction of that kind simply on the ground that the bargain, on the side of the corporation, is a disadvantageous one. In such affairs the company and the purchaser stand on the common footing of buyer and seller; the valuations of property in making the exchange, either on the one side or the other, cannot be

supervised or controlled by the court of chancery, for, in the absence of deceit, or some other corrupt constituent, the bargain between the parties cannot be disturbed. In the present instance fraud was not found, and the vice-chancellor ordered these stockholders to pay more than they had agreed to pay for the stock, on the ground that, in his opinion, the steamboats and other things they had exchanged were not worth as much as the stock was worth. Conspicuously the substance of the true issue has been overlooked. The real inquiry in this class of cases is not in doubt or obscurity, for it has been elucidated in many decisions. One example will suffice. In the case of *Coit v. The Gold Amalgamating Co.*, 119 U. S. 345, Mr. Justice Field, in the course of an investigation similar to the present one, said: 'Where the charter authorizes capital stock to be paid in property, and the shareholders honestly and in good faith put in property, instead of money in payment of their subscriptions, third parties have no ground of complaint. The case is very different from that in which subscriptions to stock are payable in cash, and where only a part of the instalments has been paid. In that case there is still a debt due to the corporation, which, if it becomes insolvent, may be sequestered in equity by the creditors as a trust fund liable to the payment of their debts. *But where full-paid stock is issued for property received, there must be actual fraud in the transaction to enable the creditors of the corporation to call the stockholders to account.*' "

In *Hebberd v. Southwestern Land & Cattle Co.*,⁵ capital stock of a corporation was issued for property not worth five per cent of the par value of the stock, in pursuance of a scheme designed to secure the issue of the stock as fully paid, without value having been received by the corporation for it. It was held that such stock was not fully paid stock in the hands of those who were cognizant of or parties to the scheme and its execution.

In that case the court further said: "As to the bonus stock, the contract between the purchaser of bonds and the company was that he should not be called upon to pay for the stock. Such a contract is binding upon the company and its shareholders, but as the capital stock constitutes a trust fund for the payment of debts, it cannot be given away from the demands of creditors, and hence the holders of bonus stock may be required to pay for it in satisfaction of the demands of creditors, after the exhaustion of all other assets, upon the ground that its issuance to them was fraud in law upon the creditors."⁶

In *Wetherbee v. Baker*, 35 N. J. Eq. 501 (Court of Errors and Appeals, 1882), the facts were as follows:

Five persons agreed for the purchase of a tract of land, and organized themselves into a corporation, under the land improvement company act. In the certificate of incorporation the capital was fixed at \$100,000, and these persons subscribed for all the capital stock, and became the

5—55 N. J. Eq. 18 (1896).

6—*Hebbard v. Southwestern Land & Cattle Co.*, 55 N. J. Eq. 18 (1896).

directors of the company. The consideration of the purchase was \$50,000; the deed was made directly to the corporation, and it gave its obligations for the whole purchase-money. The directors then appraised the lands at \$100,000, and credited \$50,000 of that valuation as a payment of fifty per cent on the subscriptions to the capital stock. The lands were not worth more than the original purchase-money, and the company acquired no other property, real or personal. In a suit brought by a creditor of the corporation against the subscribers to the capital stock, to compel them to pay their subscriptions in order to satisfy debts of the corporation, it was held that as against creditors of the corporation the allowance of a credit of fifty per cent on the subscriptions of the stockholders was invalid, and that the stockholders were liable for the whole amount of their subscriptions to the capital stock, as they appeared in the certificate of organization.

The third section of the land improvement act (Rev. p. 568) enacts that payment of the capital stock of corporations organized under the act, shall be made either in money or in land—the land to be appraised by the board of directors and taken at such value. The court held:

(1) That this section does not supersede the obligation of subscribers to pay their subscriptions, as they appear in the certificate of organization—it simply provides the manner in which payment shall be made; and in a suit by creditors against a stockholder, to compel him to pay his subscription, the inquiry is, has he paid in money or money's worth?

(2) That the directors, in the appraisal of land taken in payment of subscriptions, act in a fiduciary capacity, and are bound to discharge the duties of the trust with fidelity.⁷

The court said: "The earlier cases held that the contract of the subscribers could only be fulfilled by payment in money. In later cases this doctrine has been relaxed, and stock issued and paid up in work and labor, or in the purchase of property the corporation is authorized to hold, has been held to have been legally issued. Statutes have also been passed authorizing corporations to purchase property needed for their business, and to issue stock in payment for it, or to accept such property in payment for subscriptions to the capital stock. But in all such cases transactions under such powers have been upheld only where the contract for the rendition of services or the purchase of property, payable in stock, has been made in good faith, and the property taken in payment of stock subscriptions has been put in at a fair bona fide valuation; and the courts have inflexibly enforced the rule that payment of stock subscriptions is good as against creditors only where payment has been made in money or in what may fairly be considered as money's worth."⁸

7—*Wetherbee v. Baker*, 35 N. J. Eq. 501 (Court of Errors & Appeals, 1882).

8—*Wetherbee v. Baker*, 35 N. J. Eq. 501 (Court of Errors & Appeals, 1882); see also *Clevenger v. Moore*, 71 N. J. L. 149 (1904).

In construing the provision of the Corporation act of 1875, now section 21 of the Corporation act, the Court of Errors and Appeals said:

"The fifth section provides that where the whole capital of a corporation shall not have been paid in, and the capital paid shall be insufficient to satisfy the claims of its creditors, each stockholder shall be bound to pay, on each share held by him, the sum necessary to complete the amount of such share, as fixed by the charter of the company, or such proportion of that sum as shall be required to satisfy the debts of the company. The word 'capital,' as used with respect to corporations, primarily signifies the aggregate of the sums subscribed for, and either paid in or agreed to be paid in by the stockholders. It is also in general use as signifying the sums paid in by the subscribers, with the addition of all gains or profits realized, with such diminutions as have resulted from losses incurred in transacting business. In this latter sense the capital of a corporation is the fund with which it transacts its business, and embraces all its property, real and personal, constituting the assets of the corporation, such as are subject to execution at law. The words 'capital stock,' when aptly used, describe the interests of the stockholders in the corporation. Upon this distinction between the capital of a corporation, which is its property, and the capital stock, which represents the interests of stockholders in the corporation, and is their property, the power of the states to subject the shares of national banking associations to taxation, is vindicated. In the fifth section of the act concerning corporations the word 'capital' is used in the two-fold sense above indicated. It provides that when the capital paid in—meaning the capital paid in as increased by profits or diminished by losses, i. e., the property of the corporation—shall be insufficient to satisfy the claims of its creditors, and the whole capital—meaning the capital subscribed and agreed to be paid in—has not been paid in, then each stockholder shall be bound to pay on each share held by him the sum necessary to complete the amount of such share as fixed by the charter, or such proportion of that sum as shall be necessary to satisfy the debts of the company. The stockholders are made liable for unpaid subscriptions, upon the call of creditors, only where the property of the corporation is insufficient for the payment of its debts." ⁹

63. EFFECT OF TRANSFER OF SHARES AS TO LIABILITY OF STOCKHOLDERS.

In *See v. Heppenheimer*, 69 N. J. Eq. 36 (1905), it was held that a holder with notice of unpaid stock of the corporation was liable thereon to creditors regardless of whether he subscribed for it or not, if the capital paid in is insufficient to satisfy their claims.

"The liability of transferees for assessments on account of unpaid stock has been the subject of much consideration by the courts of this country, resulting in radical differences of opinion, but in my judgment

⁹—*Wetherbee v. Baker*, 35 N. J. Eq. 501 (Court of Errors & Appeals, 1882).

the weight of authority and sound reason support the view that a bona fide transferee of stock, the certificate for which recites that it is full paid, is not liable to make good the contract of the original subscriber if the transferee has no knowledge that the subscriber has not paid in full, nor notice of any fact from which knowledge may be inferred, or which requires him to inquire as to the truth of such statement."¹

In *Hood v. McNaughton*,² the Supreme Court said:

"The real question in the case is, whether the defendant had assigned his shares in such a way as to relieve him of responsibility. * * * The subscription to the stock and the acceptance of a certificate for the shares constitute a contract between the subscriber and the company, by which the subscriber engages to pay the remaining installment on demand by the corporation. From this agreement the subscriber cannot recede without the assent of the company. He may transfer his stock without consent of the company, and thereby vest in the purchaser his right to the share, and as between himself and such purchaser cast upon the latter the obligation to pay him such installments as are called upon the stock, but the subscriber cannot thereby impair or effect the contract rights of the company. His liability to the company cannot thereby become extinguished * * * In the case before us no circumstance is present to show that the company consented to an abrogation of its contract with the defendant, or to the substitution of his vendee as a shareholder. If the subscriber could without the consent of the company divest himself of his shares, and of his entire obligation as a stockholder, corporations might in all cases be deprived of their only available means of satisfying debts, by transfer to irresponsible persons."³

In that case the defendant was an original subscriber to the capital stock and after he had paid ten per cent on the shares subscribed for by him, he sold the said shares and delivered his certificate therefor to the vendee, but the shares were not transferred on the books of the company as required by the by-laws. The company subsequently became insolvent, and, upon proceedings duly taken in the Court of Chancery of this state, a receiver was appointed, who brought an action at law to recover the amount unpaid on the stock.

64. REMEDIES TO ENFORCE LIABILITY OF STOCKHOLDERS.

The remedies to enforce liability of stockholders are:

(a) By general creditor's bill.

(b) By the receiver in statutory insolvency proceedings.

The liability of stockholders to creditors is worked out by an accounting of the debts to be paid and the proper liability of each stockholder. If the company is in insolvency, the rate of liability is determined by a

¹—*Bergen, V. C.*, in *Easton Nat. Bank v. American Brick & Tile Co.*, 69 N. J. Eq. 326 (1905); decision modified, but not on this point, in 70 N. J. Eq. 732 (Court of Errors & Appeals, 1906).

²—54 N. J. L. 425 (1892).

³—*Hood v. McNaughton*, 54 N. J. L. 425 (1892).

judicial hearing ascertaining the quota due from each stockholder for the payment of all the debts.¹ If no receiver has been appointed, then by a bill in equity for an accounting to which the creditors and stockholders are parties.²

In the case of a going solvent company, management of its affairs, including the right to call for payments on unpaid stock, is in the directors of the company.³

In *Bickley v. Schlag*, 46 N. J. Eq. 533 (Court of Errors and Appeals, 1890), a bill was exhibited by a judgment creditor of a corporation against the stockholders, to compel them to liquidate for the benefit of the complainant the arrears of their subscriptions to the capital stock of the company. The court said: "The equity asserted by the complainant in the court of chancery, was to require the defendants to pay into the coffers of the company such sums of money as they owed to the corporation for the stock purchased by them. The means by which a creditor can enforce such a right given to him by the statute of this state, is by a bill in behalf of all the other creditors of the company as well as of himself. This is the only remedy in equity, as was recently decided by this court in the case of *Wetherbee v. Baker*, reported in 8 Stew. Eq. 507. It was there said: 'The suit must be for the benefit of all the creditors, for the trust is created for the benefit of the creditors as a class, and all are entitled to participate ratably in the common fund, and one creditor cannot, by superior diligence, either by a creditor's bill, or by supplementary proceedings under the act concerning executions, obtain priority and appropriate to his own use a fund in which all the creditors have a common interest.' * * * The appellant in this case is not only a stockholder, but is also, apparently, a creditor to a large amount of the corporation, and if, therefore, in the former capacity, he should be obliged to pay, in common with the other corporators, to the company, any money due on the purchase of his stock, it is plain that, in the latter capacity, he would be entitled to share ratably with the other creditors in the fund so brought in. It is obvious that this controversy cannot be settled in the present condition of things, and, consequently, the decree must be reversed and the respondent's bill must be dismissed without costs, and without prejudice to a subsequent prosecution of his claim, if any he has, in an unobjectionable mode."

The grounds of the jurisdiction of the Court of Chancery in cases of creditor's bills is stated by the Court of Errors and Appeals as follows:

"Each stockholder is made liable on his unpaid subscription only for the proportion thereof which may be necessary for the payment of the debts of the corporation, when the property of the corporation has

1—*Cumberland Lumber Co. v. Clinton Hill, etc., Co.*, 57 N. J. Eq. 627 (Court of Errors & Appeals, 1898).

2—*Wetherbee v. Baker*, 35 N. J. Eq. 501 (Court of Errors & Appeals, 1882).

3—*Sivin v. Mutual Match Co.*, 72 N. J. Eq. 577 (1907).

proved insufficient for that purpose. Under these circumstances, the sum of the unpaid subscriptions to the capital stock is a trust fund for the payment of the debts of the corporation. * * * In any proceeding to enforce the liability of stockholders under this section [Corporation Act, § 21], all the property and assets of the corporation must be taken into account, and the proceedings must be for the benefit of all the creditors. The assets of the corporation and its total indebtedness, must be brought into the account; for until they are ascertained, neither the amount of money required to satisfy the creditors of the corporation, nor the proportion of the sum required to be paid by each stockholder can be ascertained. The suit must be prosecuted for the benefit of all the creditors; for the trust is created for the benefit of the creditors as a class, and all are entitled to participate ratably in the common fund, and one creditor cannot, by superior diligence, either by a creditor's bill or by supplementary proceedings under the act concerning executions, obtain priority and appropriate to his own use a fund in which all the creditors have a common interest. In such a suit the corporation is a necessary party, for without the presence of the corporation as a party to the suit no account of its property or of its debts can be taken."⁴

In this class of cases insolvency, although practically existing in every case, is not a jurisdictional fact. The status of the corporation, in respect of the exercise of its franchises, is not affected further than some ancillary injunction issued in pursuance of the main object of the suit may have a temporary effect in that direction. The corporation still lives and is in possession of its franchises and is liable to this statutory suit to place it under disabilities, and any stockholder or any creditor has power to institute and maintain such a suit even though there are no assets, all having been distributed in the prior creditor's suit.⁵

In this class of cases a creditor of the corporation cannot file a bill to call in moneys due from a stockholder on his stock, until he has exhausted his remedy against the corporation by judgment, execution, and return of nulla bona.⁶

On the insolvency of a corporation, the Chancery Court has jurisdiction of a bill of its receiver to recover liabilities of stockholders for unpaid stock necessary for the payment of debts, though the corporation creditors have not recovered judgments within the state and had executions returned unsatisfied.⁷

The attorney-general is not a necessary party to a bill by the receiver

4—*Wetherbee v. Baker*, 35 N. J. Eq. 501 (Court of Errors & Appeals, 1882).

5—*Gallagher v. Asphalt Co. of America*, 65 N. J. Eq. 258 (1903).

6—*Wetherbee v. Baker*, 35 N. J. Eq. 501 (Court of Errors & Appeals, 1882).

7—See *v. Heppenheimer*, 69 N. J. Eq. 36 (1905); *Cumberland Hill Lumber Co. v. Clinton Hill Lumber Co.*, 57 N. J. Eq. 627 (Court of Errors & Appeals, 1899).

of an insolvent corporation against the stockholders and bondholders to ascertain which of the stockholders have paid for their stock and which have not, and the amount necessary for each one to pay, and to declare such bonds void, even though it is alleged in the bill that the corporation was formed for the purpose of creating a monopoly.⁸

In *See v. Heppenheimer*, 55 N. J. Eq. 240 (1897), it was urged by the defendants that the remedy of the complainant was at law and not in equity, and *Barkalow v. Totten* (53 N. J. Eq. 573), was relied upon. Vice-Chancellor Pitney said:

"But I think that the case in hand is distinguishable from that case. There an order had already been made authorizing the receiver to call in the whole amount of the unpaid subscriptions and to enforce payment of such unpaid subscriptions by suit if necessary against each of the delinquent stockholders. That order was made upon notice to each of the defendants, and it was held by the learned Vice-Chancellor that such order having been made after notice to each of the parties, an action at law would lie against each severally, and an action against all jointly in equity could not be maintained.

"Here there has been no such order made, and the very object of the suit is, in effect, to obtain a decree which will amount to such an order—that is, an ascertainment as to which of the stockholders have paid and which have not, and the amount necessary for each one to pay. The case thus viewed seems to come within the principles laid down in *Wetherbee v. Baker*, 35 N. J. Eq. 501, the only difference being that in that case the suit was brought by a single creditor, while here it is brought by the receiver, who represents all the creditors and is entitled to all remedies which they would have." And in *Gilson v. Appleby*, 77 Atl. 1084 (1910), it was held by the Supreme Court that there is no debt due for which an attachment will lie until after an order has been made by the Court of Chancery ascertaining the amount of the stockholder's liability.

A bill by a receiver of a corporation against the stockholders and bondholders of a company alleged that certain persons formed a pool to promote the organization of a stock company to buy paper mills, and procured options on thirty-nine mills at a certain price; that they transferred all options to one man; that they made from him a pretended purchase by the company for mortgage bonds, preferred stock and common stock; that they paid the original owners partly in cash, partly in preferred stock and partly in common stock, at a price far beyond the real value, and still had a large amount of bonds and stock of both kinds to be distributed among themselves as promoters; and prayed that the promoters should be decreed to make good to the company any loss by reason of any of such bonds or stock in the hands of bona fide purchasers. As to six demurring defendants the bill alleged that certain of the bonds and stock were held by them and others; that

⁸—*See v. Heppenheimer*, 55 N. J. Eq. 240 (1897).

they were not bona fide purchasers of such bonds, or bona fide creditors or stockholders of the company, and, in so far as they were not said promoters, they were the mere agents of the promoters. The object of the bill was to ascertain the amount for which each of the bonds should be held, and reduce the secured indebtedness accordingly; to declare all bonds issued without consideration void; to ascertain the amount actually paid for the stock, and, after applying the assets to payment of creditors, to assess the difference pro rata against such stockholders as had not paid for their stock. It was held, that the bill was not multifarious.⁹

"At this point we may conveniently deal with an objection that is raised by the appellants respecting the form of the procedure. As already remarked, the proceeding brought by the receiver against the present appellants was instituted by the filing of a petition setting forth the facts upon which relief was prayed. To this petition the appellants severally interposed answers, and upon the petition and answers the matter came on for hearing before the vice-chancellor. During the hearing it was objected by the appellants that since the certificates of stock with respect to which the receiver sought to hold the stockholders responsible were marked fully paid, and 'issued for property purchased,' the certificates constituted a contract between the company and its stockholders which, even if the stock had not been fully paid, prevented an assessment until the contract had been set aside as in fraud of creditors; that no order for an assessment upon the stockholders could be made in the proceedings as instituted, and that the proper course was for the receiver to file an independent bill of complaint against them seeking to have the contract under which the stock was issued set aside. The learned vice-chancellor acceded to this view, but since all the evidence necessary to settle the questions that would be raised in such a suit had been taken, counsel for all parties agreed that the receiver might amend his petition by making it a bill of complaint. The vice-chancellor granted leave to amend accordingly, and after the filing of his conclusion the receiver amended his petition by turning it into the form of a bill, adding a prayer that the contract under which the stock was issued as fully paid might be declared fraudulent and set aside on that ground. It is now objected by appellants that if this amended petition be treated as an original bill, it is multifarious, as presenting two opposite and contrary claims for relief, one that the stock was legally issued, subject to future assessment, and the other that the stock was fraudulently issued as fully paid and non-assessable, and that the illegal contract should be annulled. The objection of multifariousness having been raised before the vice-chancellor, the appellants insist that they are now entitled to the benefit of it.

"In our view, this whole difficulty is imaginary. Assuming the case showed a contract between the company and its stockholders that the

⁹—See *v. Heppenheimer*, 55 N. J. Eq. 240 (1897); affirmed 56 N. J. Eq. 453 (Court of Errors & Appeals, 1897).

stock certificate should be issued as full paid and as for property purchased, and that this contract was in fact of such a character and made under such circumstances that it contravened the prohibition of the Corporation act, it was not merely voidable, but void. It had as little effect for any purpose as the contract that was before this court in *Volney v. Nixon*, 68 N. J. Eq. 605, and could not be laid hold of by either party as a ground of action or a ground of defense. No bill or other original proceeding was necessary to procure an adjudication of its nullity, and the court, on the petition originally filed by the receiver for the purpose of enforcing the liability of the stockholders for the unpaid portion of their subscriptions, upon ascertaining the facts that rendered the so-called contract void, was at liberty to treat it as affording no obstacle to the relief prayed by the receiver."¹⁰

"In looking at the cases it appears that, in some instances, the court itself has made the call (*Hood v. McNaughton*, 54 N. J. L. 426; *Sanger v. Upton*, 91 U. S. 58; *Hawkins v. Glenn*, 131 U. S. 328, 334), on the ground that the court will do what it is the duty of the company to do, and in others the court has directed the receiver to make it (*Scoville v. Thayer*, 105 U. S. 146; *Barkalow v. Totten*, 53 N. J. Eq. 573). While I think the stockholders would be bound whether it was made in the one way or the other, the latter method of assessment would seem to be the better under the act of 1896. It was long a question of doubt whether, under the former corporation act, a receiver of an insolvent corporation was vested with the legal title to the assets of the corporation, or was merely their custodian, with the powers mentioned in the statute. * * *

"To settle this question, the act of 1896 (P. L. of 1896, p. 299, § 68), provided as follows:

"All the real and personal property of an insolvent corporation, wheresoever situate, and all its franchises, rights, privileges and effects shall, upon the appointment of a receiver, forthwith vest in him, and the corporation shall be divested of the title thereto."

"This property and these rights, privileges and franchises are vested in him *as receiver*, and in the language of the opinion of the Court of Errors, in *Vanderbilt v. Central Railroad Co.*, 43 N. J. Eq. 682, are to be held and exercised by him, under the control of the court. One of the rights that might have been exercised by the corporation was the right to make an assessment, and this right, with the others, passed to the receiver as such. The situation, at least under the present statute, seems in all respects to be similar to that which existed under the late Bankrupt act, where, by operation of law, the assignment of the register vested the legal title of the bankrupt in the assignee. *Scoville v. Thayer*, 105 U. S. 146, a case which arose under that act is, therefore, a direct authority for the practice of directing the receiver to make the assessment, and this practice appears to me to harmonize best with the

10—*Pitney, J.*, in *Easton National Bank v. American Brick, etc., Co.*, 70 N. J. Eq. 722 (Court of Errors & Appeals, 1906).

provisions of section 22 of the Corporation Act, which provides that the directors shall give thirty days' notice of the assessment and of the time and place of payment. This notice in the case of insolvent corporations will be given by the receiver. It is, indeed, a necessary part of the 'call.'

"In the case in hand the receiver has followed the practice pursued in *Scoville v. Thayer*. He presented a petition to this court, setting forth the facts showing the necessity for an assessment. On this petition the court ordered the stockholders to show cause why it should not be made. The order was duly served, and on the day fixed for the hearing, many of the stockholders appeared by counsel. As no good cause was shown against the order, the prayer of the petition will be granted."¹¹

When a receiver of an insolvent company shows, in proceedings for an order authorizing an assessment against delinquent subscribers to stock, a case which entitles him to test by suit the status of persons supposed to be stockholders, but who allege that they are not, the court should direct the assessment, and leave the liability of the individual subscribers to be tested by suit, if necessary.¹²

"The whole of this court's authority on an application of this character, as I understand it, extends, first, to the ascertainment of the amount of the debts which are valid as against the company itself; second, the ascertainment of the stockholders of the company who have not fully paid their subscriptions or for their stock, and third, the amount of the call for unpaid subscriptions or stock necessary to pay the debts, taking into account the assets of the company in the receiver's hands and the solvency or insolvency of the stockholders liable, or claimed to be liable. As to the first, the final ascertainment of the amount of debts in the insolvency proceedings itself must be taken as final against the company, and for the purpose of this proceeding, as against the stockholders or persons claimed to be such. As to the second point, if the status of the respondents as stockholders is disputed, and the receiver shows on his part a case which entitles him to test this question by suit, the court should direct the assessment, leaving the defenses of any stockholder or alleged stockholder to be settled by suit, if necessary. The receiver does show such a case here, and therefore should be allowed to test the liability of the respondents as stockholders by regular proceedings. The present proceeding is, in my judgment, neither intended for, nor adapted to, the settlement of the above defenses of the different stockholders or persons claimed to be stockholders, set up in this proceeding against a recovery for unpaid subscriptions for stock. This is purely a judicial proceeding of an administrative character, intended to give to the receiver the same status which the company itself had, or might reasonably be claimed to have,

11—*Falk v. Whitman Cigar Co.*, 55 N. J. Eq. 396 (1897).

12—*Cumberland Lumber Co. v. Clinton Hill Lumber & Mfg. Co.*, 64 N. J. Eq. 517 (1903).

to make a call for the payment of its debts against its stockholders or persons claimed to be such. In relation to the calls upon stockholders for the payment of debts, the receiver succeeds to the right of the company. *Falk v. Whitman Cigar Co.*, 10 Dick. Ch. Rep. 396 (Vice-Chancellor Stevens, 1897). It is objected that by the provisions of the twenty-seventh section of the Corporation act the assessment by directors could only be made by the consent of two-thirds of the stockholders, but this express provision authorizing the directors, at their discretion, to make the call for any purpose, does not touch the power or the duty of the directors to make a call, when necessary, for the payment of the debts, and in case of insolvency, the court of equity will execute this trust upon which the capital stock is held, by directing the assessment.

"In reference to the third question to be settled on this proceeding, viz., the amount of the assessment, it is insisted that the receiver has a right of action or claim against the estate of William S. Ketcham for the subsequent conversion to his own use of the goods and chattels, which, as the receiver claims, were conveyed to the company in payment of forty per cent. of the subscriptions of Ketcham and his two sons to the capital stock, and that he should exhaust this right of action before an assessment is made. There is, in my judgment, no substantial basis for this contention. The claim is disputed, the receiver has no assets for its prosecution, and could not be required to prosecute in aid of the stockholders, except upon their indemnification against the expenses. *Kalmus v. Ballin*, 7 Dick. Ch. Rep. 290, 295. In the absence of such indemnification and of the stockholders' assertion of the validity of the claim, the receiver, for the purpose of the speedy settlement of the estate, as required by the general policy of the Insolvent Corporation law, should be authorized to call for the unpaid subscription, leaving to the stockholders the right, if they desire, to prosecute for their own indemnification hereafter in the receiver's name, if necessary, any claim the company may have against the estate of Ketcham for this conversion of the goods. The receiver will therefore be directed to make an assessment, and the form of the order will follow the order in *Falk v. Whitman Cigar Co.*, *supra*." ¹³

While the stockholders of a corporation cannot interpose any defenses to an insolvency suit against it that the corporation itself cannot set up, they can have the validity of matters alleged as a defense to their liability as stockholders adjudicated in suits brought by the receiver to collect assessments levied against them.¹⁴

In an action based on a decree of the court of chancery made after hearing on petition, answer and replication, in which proceedings the court took an account of all the assets of an insolvent corporation, and

¹³—*Cumberland Lumber Co. v. Clinton Hill Lumber & Mfg. Co.*, 64 N. J. Eq. 517 (1903).

¹⁴—*Cumberland Lumber Co. v. Clinton Hill Lumber Co.*, 64 N. J. Eq. 521 (1903).

of all its liabilities, ascertained the amount of unpaid subscriptions and who were the parties to be assessed and directed the amount to be assessed against them, it was held that such decree is conclusive as to the subscription to the capital stock of the insolvent corporation and that the same remains unpaid to the amount set out in the decree.¹⁵

"The insistment that it was unnecessary, and, therefore, illegal, to require the defendant to pay the full amount unpaid on his shares, in order to satisfy the debts of the company, cannot be entertained in this court. The decree of the Court of Chancery requires the payment of the entire amount, and the validity of that decree cannot be drawn in question in this suit, which is collateral to it. The receiver stands in the place of the stockholders as their representative, and all the rights of the company reside in him. The company before insolvency could have called the whole amount unpaid, and such a call could not, in the absence of fraud, have been questioned by the stockholders. If there remains a surplus in the hands of the receiver after the debts are paid, he will distribute it to the shareholders equitably."¹⁶

Where a petition by the receiver of an insolvent corporation showed that certain shares of stock of the corporation had been issued by it in payment for the property conveyed to it, which conveyance was thereafter judicially declared void, so that the consideration for the shares of stock issued in payment, wholly failed, and that the shares had been transferred to various persons, it is within the court's discretion to grant leave to the receiver to file a bill in behalf of the parties interested to determine the rights of such stockholders. Such a bill need not disclose whether the assets the receiver has reached or may reach, are sufficient to satisfy the creditors.¹⁷

When a corporation has been decreed insolvent and a receiver appointed, interest on the corporation's debts should be included in an assessment against the stockholders, and the receiver is entitled to have expenses incurred in suits brought pursuant to the court's order included in an assessment against the stockholders, even though the costs paid in such suit went to the persons to be assessed as stockholders.¹⁸

In a suit by a receiver against stockholders to recover on liability for unpaid stock, the amount necessary to be raised should be computed by ascertaining the amount due on the several claims allowed and approved, with interest, plus the fees of solicitors for the creditors in a proceeding to wind up the corporation and in the action to recover against the stockholders, plus a reasonable counsel fee and compensation to the receiver, and expenses incurred in the enforcement of the decree against the stockholders.¹⁹

15—McCarter, Receiver, v. Ketcham, Admr., 74 N. J. Law, 829 (Court of Errors & Appeals, 1907).

16—Hood v. McNaughton, 54 N. J. L. 425 (1892).

17—McMaster v. Drew, 70 N. J. Eq. 6 (1906).

18—Cumberland Lumber Co. v. Clinton Hill Lumber Co., 64 N. J. Eq. 521 (1903).

19—See v. Heppenheimer, 69 N. J. Eq. 36 (1905).

Where, in a suit by the receiver of an insolvent corporation to recover on stockholders' liabilities for unpaid stock, nonresident stockholders having no property in New Jersey appeared and litigated the question of their liability, they thereby submitted themselves to the jurisdiction of the court and are subject to a decree, though recourse to the courts of the state of their residence may be required in order to enforce the same.²⁰

65. RIGHT OF CONTRIBUTION AMONG STOCKHOLDERS; SUBROGATION; SET-OFF.

The liability of stockholders is analogous to that of joint guarantors in that those who are solvent and within the jurisdiction of the court can properly be charged with the entire burden regardless of the liability of others, and they in turn are entitled to recover contribution from the others.¹

In a suit by a receiver of an insolvent corporation to recover on stockholders' liabilities for unpaid stock, the stockholders are not entitled to set off claims against the corporation on bonds issued by it which have not been filed as claims against the corporation and which are barred by the decree barring creditors.²

A stockholder is not allowed to set off his demand against a corporation against his liability, on account of his unpaid stock holding, for the reason that the assets of the company are insufficient to pay its liabilities, and the unpaid stock demands now constitute a fund for the equal benefit of all creditors.³

Under the General Corporation act of 1875, a creditor's knowledge that stock was improperly issued as "full paid" and as "issued for property purchased," when the fact was otherwise, is not, however, sufficient to debar him from relief against the recipients of the stock.⁴

20—See *v. Heppenheimer*, 69 N. J. Eq. 36 (1905).

1—See *v. Heppenheimer*, 69 N. J. Eq. 36 (1905).

2—See *v. Heppenheimer*, 69 N. J. Eq. 36 (1905).

3—*Hebberd v. Southwestern Land & Cattle Co.*, 55 N. J. Eq. 18 (1896).

4—*Easton National Bank v. American Brick, etc., Co.*, 70 N. J. Eq. 732 (Court of Errors & Appeals, 1905).

VI. OFFICERS AND AGENTS.

66. THE BOARD OF DIRECTORS; HOW CONSTITUTED AND ELECTED; NUMBER; TERM OF OFFICE; DIVISION INTO CLASSES.

The business of every corporation shall be managed by its directors, who shall respectively be shareholders therein; they shall not be less than three in number, and, except as hereinafter provided, they shall be chosen annually by the stockholders at the time and place provided in the by-laws, and shall hold office for one year and until others are chosen and qualified in their stead; but by so providing in its certificate of incorporation, any corporation organized under this act may classify its directors in respect to the time for which they shall severally hold office, the several classes to be elected for different terms; provided, that no class shall be elected for a shorter period than one year or for a longer period than five years, and that the term of office of at least one class shall expire in each year; any corporation which shall have more than one kind of stock may, by so providing in its certificate of incorporation, confer the right to choose the directors of any class upon the stockholders of any class or classes, to the exclusion of the others; one director of every corporation of this state shall be an actual resident of this state, and it shall not be necessary for more than one director to be a resident of this state, notwithstanding the provisions of any special charter or other act.¹

The stockholders of a corporation organized under the General Corporation act may, at a special meeting called for the purpose, increase the number of directors of the company by amendment to the by-laws taking immediate effect. In the absence of other provisions in the by-laws, it will then be the right and duty of the stockholders to elect the additional directors.²

The court said: "We think it clear that under the amended by-laws it became the right and duty of the stockholders to elect the additional directors, and that they could do so at a special meeting called for that purpose. The form of notice of such a purpose, that was given in this case, is criticised; but we think it was intended, and must have been understood, to be a notice that if the proposed increase in the number of directors should be authorized, the election of the new directors would be forthwith moved. I have doubt of the strict propriety of that mode of procedure. Until the amendment there could be no election at a special meeting, and an anticipatory call for such a meeting for the purpose of an election would be incongruous to say the least. As a

1—Corporation Act, § 12.

2—In re Griffing Iron Co., 63 N. J. L. 168 (1898); affirmed 63 N. J. L. 357 (Court of Errors & Appeals, 1899).

bare majority of a quorum of stockholders may alter the by-laws of a corporation it would seem but fair to require that an election authorized by amendment should be held at a subsequent meeting, called upon notice to every stockholder. In fixing the time for such a meeting, regard should be had to certain provisions of the statute that may be applicable even to special elections of the character of that in question. Section 36 disentitles, to be voted on, any stock transferred on the books of the company within twenty days next preceding an election, and section 33 directs that a list of stockholders shall be prepared and held open for inspection for at least ten days before every election of directors after the first. It does not appear before us that any stock had been transferred within twenty days before the challenged election and I speak of that subject by way of suggestion only. Section 33 is all that need now be considered. Of course, under less than ten days' notice, to amend by-laws and elect directors, the stockholders could not have the time given by that section to inspect a prepared list of stockholders; but that fact should not in a proceeding like the present avail to defeat an election clearly expressive of the will of the stockholders. Every share of stock was represented at the meeting and a majority both in number and in interest, of all the stockholders, voted for the directors whose title is assailed, and still acquiesce in the result; and it would be capitious in this court to order a new election for mere formality's sake. In *Downing v. Potts*, 3 Zab. 66, Chief Justice Green held that the provisions of the statute, now section 33 of the Corporation act, were directory only." ³

67. ELIGIBILITY, ACCEPTANCE AND QUALIFICATION FOR OFFICE.

No person shall be elected a director of any corporation issuing stock unless he shall be, at the time of his election, a bona fide holder of some of the stock thereof; and any director ceasing to be a bona fide holder of some of the stock thereof shall cease to be a director; any corporation may, by its certificate of incorporation or by-laws, determine how many shares a person shall hold to qualify him to be a director.¹

With respect to the qualifications of a director, the company's books are not conclusive. A person may be qualified to be a director whose vote cannot be received at the election. The question of the competency of a person for the directorship is one exclusively of judicial cognizance, over which the inspectors of the election have no jurisdiction. Independent of the statute, a person might be a director of a corporation without being a stockholder. The statute prescribes as the qualification of a director, that he shall be a *bona fide* holder of stock. A stockholder may have purchased stock with a view of becoming a director, or have obtained it by gift, or he may hold it upon a trust, and be qual-

3—In re Griffing Iron Co., 63 N. J. L. 168 (1898); affirmed 63 N. J. L. 357 (Court of Errors & Appeals, 1899).

1—Corporation Act, § 39.

fied to be a director. If the stock was legally issued, and is not the property of the corporation, and the legal title is in him, he is, *prima facie*, capable of being a director, and his right to be a director, in virtue of his legal title to such stock, can be impeached only by showing that title was put in him colorably, with a view to qualify him to be a director for some dishonest purpose, in furtherance of some fraudulent scheme touching the organization or control of the company, or to carry into effect some fraudulent arrangement with the company.²

When at an election of directors, the directors neglect or refuse to produce an alphabetical list of all stockholders entitled to vote, with the residences and number of shares held by each, although the stock and transfer books be present at such meeting, such neglect or refusal, pursuant to section 33 of the Corporation act, renders such directors ineligible to any office at such election, and if any of such directors are voted for and declared elected at such meeting, their election will be set aside.³

The failure to file an annual report as required by section 43 of the Corporation Act does not render the directors ineligible for election or appointment as officers unless such failure was due to the willful refusal of the directors to file the report. Where it appeared that a report had been drawn by the counsel of the company and signed by the president and delivered to the secretary to file, but for some reason was never filed and none of the directors were aware of the fact until several months later, whereupon the report was immediately filed, the Supreme Court held that such failure did not constitute willful refusal.⁴

68. RESIGNATION, DISQUALIFICATION AND REMOVAL OF OFFICERS; FILLING OF VACANCIES.

A director or other officer may resign at any time. Acceptance by the board is not necessary.¹

The statute recognizes a power of removal and such power is indeed inherent. If there be a fixed term of office removal must be for cause, but otherwise, unless limited by statute or by-law, the power to remove ministerial officers is absolute, in the body that elects, subject only to a right of action if there be a breach of contract of employment. The president of a corporation has no securer tenure than any other ministerial officer.²

If the by-laws so warrant directors may even be removed during their term. In *Imperial Hydropathic Hotel Co. v. Hampson*, 23 Ch. D. 1, it was held that without such warrant in the articles of association the

2—*Matter of St. Lawrence Steamboat Co.*, 44 N. J. L. 529 (1882); *In re Leslie*, 58 N. J. L. 609 (1896).

3—*In re Schwartz & Gray*, 77 N. J. L. 415 (1909).

4—*In re Election Brooklyn Baseball Club*, 75 N. J. L. 64 (1907).

1—*Fearing v. Glenn*, 19 C. C. A. 288; *International Bank v. Faber*, 30 C. C. A. 178.

2—*In re Griffing Iron Co.*, 63 N. J. L. 168 (1898).

directors of a joint stock company could not be removed except for cause; but Sir George Jessel, Master of the Rolls, said that under a clause in the articles of association, authorizing amendments, it was competent for the stockholders to pass a clause enabling them to remove the directors and act upon it.³

The power of filling vacancies being incident to a corporation, it has the right, by its by-laws, to prescribe the manner in which such vacancies shall be filled, provided it is not inconsistent with the design of the charter.⁴

The Corporation Act provides (section 15) that "any vacancy occurring among the directors or in the office of president, secretary or treasurer by death, resignation, removal or otherwise, shall be filled in the manner provided for in the by-laws; in the absence of such provision such vacancies shall be filled by the board of directors." In *re Griffing Iron Co.*, 63 N. J. L. 168 (1898), it was held that this language is inappropriate to a directorship newly created. The court said the filling up of a board whose membership is enlarged seems to be left to the creating body, that is, the stockholders; in the absence of express provision there is implied power in the stockholders to do everything necessary to effectuate the corporate function.

69. POWERS AND AUTHORITY OF DIRECTORS.

The directors of a corporation have power to make any contract which may be necessary or fit and proper to enable the corporation to accomplish the purposes of its creation.¹

Individual stockholders cannot question, in judicial proceedings the corporate acts of directors, if the same are within the powers of the corporation and in furtherance of its purposes, are not unlawful or against good morals, and are done in good faith and in the exercise of an honest judgment. Questions of policy of management, of expediency of contracts or action, of adequacy of consideration not grossly disproportionate, of lawful appropriations of corporate funds to advance corporate interests, are left solely to the honest decision of the directors, if their powers are without limitation and free from restraint. "To hold otherwise would be to substitute the judgment and discretion of others in the place of those determined on by the scheme of incorporation" ²

3—In *re Griffing Iron Co.*, 63 N. J. L. 168 (1898).

4—*Kearney v. Andrews*, 10 N. J. Eq. 70 (1854).

1—*Park v. Grant Locomotive Works*, 40 N. J. Eq. 114 (1885); *Elkins v. Camden & Atlantic R. R. Co.*, 36 N. J. Eq. 241 (1882).

2—*Ellerman v. Chicago Junction Railways, etc., Co.*, 49 N. J. Eq. 217 (1891); *Elkins v. Camden & Atlantic R. R. Co.*, 36 N. J. Eq. 241 (1882); *Park v. Grant Locomotive Works*, 40 N. J. Eq. 114 (1885); *Benedict v. Columbus Construction Co.*, 49 N. J. Eq. 23 (1891); *Willoughby v. Chicago Junction Railway Co.*, 50 N. J. Eq. 717 (1891); *Edison v. Edison United Phonograph Co.*, 52 N. J. Eq. 620 (1894); *Donald v. American Smelting, etc., Co.*, 62 N. J. Eq. 729 (Court of Errors & Appeals, 1900);

The directors of a corporation are not individually its agents for the transaction of its ordinary business, which is usually delegated to its executive officers. Directors are possessed of extensive powers, even to the extent of absolute control over the management of its affairs, but these powers reside in them as a board; and, when acting as a board, they are collectively the representatives of the corporation.³

The Corporation law provides (§ 12), that "the business of every corporation shall be managed by its directors." The law thus confides the business management of the corporation to its directors. The directors must act in behalf of the corporation. They represent all of the stockholders and creditors, and cannot enter into agreements, either among themselves or with stockholders, by which they abdicate their independent judgment. Mr. Justice Garrison, in a recent decision said: "A contract by which the directors of such corporations in conclusive form abdicate their duty of management in this respect, and turn it over to an alien body, is in direct violation of the words and meaning of the statute, and is as typical an instance of an ultra vires act as can well be imagined. To do so in a given instance would be an illegal act."⁴

70. MEETINGS OF DIRECTORS.

In *Audenried v. East Coast Milling Co.*, 68 N. J. Eq. 450 (1904), Vice-Chancellor Bergen said: "When authority to manage the affairs of a corporation is vested in a board of directors it is conferred upon them as a board and not as individuals. If they act or give their consent separately, and not as a board, their conclusion is not the action of the corporation, although all may consent, and the corporation is not bound in the absence of ratification. This eminently wise and just rule, the complainant claims, may be abrogated by persons incorporating themselves under the General Corporation act of this state, and he relies upon subdivision 7 of section 8 of the act, which permits any provision which the incorporators may choose to insert 'for the regulation of the business, and for the conduct of the affairs of the corporation, and any provision creating, defining, limiting and regulating the powers of the corporation, the directors and the stockholders, or any class or classes of stockholders; provided, such provision be not inconsistent with this act.'

"If the power to legislate as these incorporators have legislated exists, it must be found in the expression, 'any provision creating, defining, limiting and regulating the powers' of directors. Under this clause, it is insisted that the legislature has granted the right, not only of creating, defining, limiting and regulating the powers of the corporation,

Berger v. United States Steel Corporation, 63 N. J. Eq. 809 (Court of Errors & Appeals, 1902).

3—*First National Bank of Hightstown v. Christopher*, 40 N. J. L. 435 (1878).

4—*McCarter v. Firemen's Ins. Co.*, 74 N. J. Eq. 372 (Court of Errors & Appeals, 1909); *Jackson v. Hooper*, 75 Atl. 567 (Court of Errors & Appeals, 1910).

but also the right to authorize the directors to exercise the powers thus established according to any method the incorporators may see fit to adopt, although the power to do this is not granted in express terms. I do not so interpret these words. The right 'to create' is limited to the establishing of or regulating a power to be exercised by the corporation through its directors, which power shall not be inconsistent with the terms of the general act. The method of exercising the power created must conform to settled legal principles, unless it be otherwise distinctly authorized by the legislative act. No such express authority is conferred by this act and it ought not to be inferred from ambiguous expressions. To hold that the legislature of our state, by the adoption of our General Corporation act, intended to confer upon individuals an indefinite power of legislation, would require the adoption of a liberality of construction which the act does not warrant, and which upon every known principle is contrary to public policy. The act is, by its terms, sufficiently broad, elastic and liberal, and I am unwilling to read into it any such power as this complainant insists upon, for, in my judgment, it is only a board duly convened and acting as a unit that is made the representative of the company. Nowhere in this act is it intimated that a board of directors may act independently or otherwise than as a united body, counseling with each other with regard to every determination that may affect the corporation. On the contrary, it requires that the business of every corporation shall be managed by its directors, and that all votes of the corporation and directors shall be recorded by the secretary in a book to be kept for that purpose, which we must assume means that this secretary, who is required to be a sworn officer, shall be present and record the votes of the directors. The proposition that the stockholders, in assenting to this provision in the articles of association, waived the advantage and protection they would enjoy under the common law and our Corporation act, does not meet the case. Stockholders may waive an advantage, but they cannot by waiver ordain a method of corporate action which the law does not recognize, nor dispense with the aid of a board of directors as a means of corporate action. Such a course is not sanctioned by our law and is inconsistent with the twelfth section of our act, which requires that 'the business of every corporation shall be managed by its directors.' But we ought not to confine the consideration of this question to the relationship existing between the stockholders and the directors. The business of the state is to a large extent carried on by corporations, and their transactions directly and vitally affect the interests of all the people. In committing the transaction of business so generally to corporations, the legislature may be presumed to have provided for and recognized deliberative meetings of directors as a safeguard to the public interest, which presumption ought not to be overthrown by a forced construction of the act. The fundamental idea of a business corporation involves an advantage coming from the aggregation of wisdom, knowledge and business foresight which results from bringing a

large number of stockholders and directors into a common enterprise. It is their knowledge and wisdom combined, acting as a unit, that gives efficiency and safety to the corporate management. I am satisfied that the section of this charter now under consideration is contrary to the provisions of our Corporation act, and that there is no express or implied authority conferred thereby which will allow a corporation to determine, in its articles of association, that its board of directors may avoid the performance of their duties in the manner required by the word and spirit of our act and the well-settled law on that subject. To permit it would engraft upon the law a vicious and dangerous power, and in the absence of express legislative authority I am unwilling to sanction it."

Accordingly it was held that a provision in a certificate of incorporation that any resolution in writing signed by all the members of the board of directors, shall constitute action by the board, with the same force and effect as if the same had been duly passed by the same vote at a duly called meeting of the board, is not authorized by the General Corporation act.¹

The Corporation Act provides (§ 44) that the directors may hold their meetings, and have an office, and keep the books of the corporation (except the stock and transfer books) outside of this state, if the by-laws or certificate of incorporation so provide.

All of the directors are entitled to notice, either express or implied, of any meeting at which any business is to be transacted, in order that the business may be binding upon all the persons concerned. In the case of regular meetings—that is, such as are provided for by the charter or the by-laws, fixing the time and place—then notice thereof is implied. Of all other meetings, especially those at which any business not pertaining to the ordinary affairs of the corporation is transacted, express notice must be given of the time and place and the object or purpose of the meeting.²

In the absence of such notice, a special meeting will not be legally convened.

A majority of the directors of a corporation, in the absence of any statutory regulation, is a quorum, and such majority, when convened, can do any act within the power of directors.⁴

In the absence of a rule requiring the concurrence of a definite number, a majority of a quorum duly convened may act.⁵

1—Audendried v. East Coast Milling Co., 68 N. J. Eq. 450 (1904). See also Demarest v. Spiral Riveted Tube Co., 71 N. J. L. 14 (1904).

2—Whitehead v. Hamilton Rubber Co., 52 N. J. Eq. 78 (1893); Metropolitan Telephone Co. v. Domestic Telegraph Co., 44 N. J. Eq. 568 (Court of Errors & Appeals, 1888).

3—Metropolitan Telephone Co. v. Domestic Telegraph Co., 44 N. J. Eq. 568 (Court of Errors & Appeals, 1888).

4—Kuser v. Wright, 52 N. J. Eq. 825 (Court of Errors & Appeals, 1894); Wells v. Rahway Rubber Co., 19 N. J. Eq. 402 (1869).

5—Metropolitan Telephone Co. v. Domestic Telegraph Co., 44 N. J. Eq.

"All deliberative assemblies, during their session, have a right to do and undo, consider and reconsider, as often as they think proper, and it is the *result* only which is done." ⁶

71. DELEGATION OF AUTHORITY BY CORPORATE OFFICERS.

In *Titus & Scudder v. Cairo & Fulton R. R. Co.*, 46 N. J. L. 393, 418 (1884), the Supreme Court said "Except where a known usage of trade justifies, or necessity requires, the employment of subagents, an agent whose powers and duties involve personal trust and confidence and the exercise of judgment and discretion, cannot, without authority from his principal, delegate to another the confidence and discretion reposed in him. Having, by his own judgment and discretion, determined what should be done, he may authorize another to perform the ministerial acts necessary to carry into effect the purposes of his employment, but he cannot turn his principal's business over to the judgment and discretion of another, and bind the principal by the acts and conduct of the latter."

Directors of an incorporated company, although in a sense agents of the company, may in some cases, appoint subagents, whose acts will bind the company. The general rule is, that directors may not delegate authority in matters committed to their discretion and judgment. But since incorporated companies for business purposes have become so common, the rigor of this rule has been measurably relaxed. "It would intolerably restrict the operations of a great railroad or manufacturing corporation if every contract of employment of its workmen or of sale of manufactured articles must be made directly by the directors. The universal practice is to commit such matters of current and ordinary business to committees, superintendents and clerks. With respect to such business it may be said that authority to bind the company may be delegated, because it has not been confided to the personal judgment and discretion of the directors. If this point called for decision, I should incline to the view that the trustees, if possessed of the ordinary powers of directors, might authorize a committee to make such a contract, being for its current and ordinary business, and that the resolution, although expressed in very broad terms, should be construed to give such authority as the trustees could give." ¹

72. POWERS AND AUTHORITY OF PRESIDENT AND OTHER OFFICERS.

Every corporation organized under this act shall have a president, secretary and treasurer, who shall be chosen either by the directors or

569 (Court of Errors & Appeals, 1888). *State v. Patterson*, 35 N. J. L. 190 (1871); *McDermott v. Miller*, 45 N. J. L. 251 (1883); *Cadmus v. Farr*, 47 N. J. L. 208 (1885).

6—*State v. Foster*, 7 N. J. L. 101, 107 (1823).

1—*Metropolitan Telephone Co. v. Domestic Telegraph Co.*, 44 N. J. Eq. 568 (Court of Errors & Appeals, 1888).

stockholders, as the by-laws may direct, and shall hold their offices until others are chosen and qualified in their stead; the president shall be chosen from among the directors; the secretary shall be sworn to the faithful discharge of his duty, and shall record all the votes of the corporation and directors in a book to be kept for that purpose, and perform such other duties as shall be assigned to him; the treasurer shall give bond in such sum, and with such surety or sureties, as shall be required by the by-laws, for the faithful discharge of his duty.¹

The corporation may have such other officers, agents and factors, who shall be chosen in such manner and hold their office for such terms as may be prescribed by the by-laws.²

It is held that the president, as the chief executive officer of a corporation, has authority, *virtute officii*, to take all steps necessary for the defense of his company in litigations in which it may be involved, including the employment of an attorney for the purpose.³

Where the office of treasurer of a corporation is annual or limited, the sureties on his official bond will not be liable for a breach of the duties of such officer beyond the definite term, when the condition is for good behavior during his continuance in office; but if there be added thereto "whether of the present term for which he has been elected, or of any succeeding terms to or for which he may be elected," their liability continues.⁴

73. RELATION OF CORPORATE OFFICERS TO THE STOCKHOLDERS, THE CREDITORS AND THE CORPORATION: RIGHTS, DUTIES AND LIABILITIES IN GENERAL ARISING THEREFROM.

An action will not lie in behalf of a stockholder in a corporation against its directors for their negligence in so conducting its affairs that its capital had been impaired or lost and the shares of its stock in that manner rendered worthless. This rule rests on general principles which lie at the basis of all corporate existence, namely, that there is no legal privity between the holders of shares in a corporation, in their individual capacity on the one side, and the directors of the company on the other; that the directors are not the bailees, agents or trustees of such several stockholders; that the corporation is a distinct person in law, in whom all the corporate property is vested, and to whom all of its agents and officers are responsible for all torts and injuries diminishing or impairing its property; that the individual members of the company have no right or power to intermeddle with the property or concerns of such company, or to call any agent or officer

1—Corporation Act, § 13.

2—Corporation Act, § 14.

3—Beebe v. The George H. Beebe Company, 64 N. J. L. 497 (1900); but see section 73 below.

4—Peoples' Bldg. Assn. v. Roth, 43 N. J. L. 70 (1881); see also 65 N. J. L. N. J. Corp. Law—12

to account, or to discharge them from any liability; that the injury done to the capital by wasting it, is not, in the first instance, nor necessarily, a damage to the stockholders; that all sums which could in any form be recovered on that ground would be assets of the corporation, to be applied, in the first instance to the payment of debts, the surplus only being distributable among the stockholders, and that it is therefore only an indirect, contingent and subordinate interest in damages so as to be recovered that is vested in shareholders. The legal effect of this doctrine is that those acts of the officers and agents of the corporation which diminish or destroy the capital of the company are direct injuries to the corporate body, and that it only can seek reparation for such wrongs. In such cases, if the directors or other principal officers are the wrongdoers, or if not being thus implicated, they refuse to promote the requisite suit, a stockholder acting for himself and the other stockholders and for the company, may call such delinquent officials to account in a court of equity. The theory is that under the given conditions the corporation is entitled to indemnification, and that when this is effected the stockholder ceases to be a loser.¹

A director, or the treasurer, of a corporation, is not, because of his office, in duty bound to disclose to an individual stockholder, before purchasing his stock, that which he may know as to the real condition of the corporation affecting the value of that stock. He is, to some extent, trustee for the stockholders, as a body, in respect to the property and business of the corporation, but does not sustain that relation to individual stockholders with respect to their several holdings of stock over which he has no control.²

Directors do not sustain toward creditors of a corporation the relation of trustees, so as to render them liable to such creditors for the negligent management of the ordinary business affairs of the corporation,³ but this rule has no application to the case of a receiver of an insolvent corporation, suing its directors, where the mismanagement, producing insolvency, consists in diverting all the assets of the company to the directors themselves or to a company of which they are the sole stockholders.⁴

Officers are, therefore, liable to refund excessive salaries, as being a misappropriation of the assets, so far as necessary for the payment of debts.⁵

Under the general principles of agency, however, where corporate

1—Beasley, C. J., in *Conway v. Halsey*, 44 N. J. L. 462 (1882).

2—*Crowell v. Jackson*, 53 N. J. L. 656 (Court of Errors & Appeals, 1891).

3—*Landis v. Sea Isle City Hotel Co.*, 31 Atl. 755 (1894); affirmed 53 N. J. Eq. 654 (1895).

4—*Hayes v. Pierson*, 65 N. J. Eq. 353 (Court of Errors & Appeals, 1903).

5—*Mills v. Hendershot*, 70 N. J. Eq. 258 (1905); *Hayes, Receiver, v. Pierson*, 65 N. J. Eq. 353 (Court of Errors & Appeals, 1899); *Davis v. Thomas & Davis Co.*, 63 N. J. Eq. 572 (1902); *Lillard v. Oil, Paint & Drug Co.*, 70 N. J. Eq. 197 (1903).

officers borrow money or otherwise contract for a purpose which is ultra vires of the corporation they are personally liable for any engagement effected by them and not enforceable against it.⁶

In *Westervelt v. Demarest*, 46 N. J. L. 37 (1884), the Supreme Court held that the publication by savings bank directors that "directors and stockholders are personally responsible for its debts," does not constitute a contract with those who may make deposits; but if the statement is false it lays the foundation for an action for deceit.

In a suit to set aside complainant's contract to take stock of a corporation, and also to recover the amount he had paid under it, on the ground that he was induced to enter into it by wilful misrepresentation, it was held that the directors of the corporation making such misrepresentations, as well as the corporation itself, were liable. The court said: "When a fraud is committed in the name, and under cover of a corporation, by persons having the right to speak for it, for their personal gain and benefit, they are bound to answer personally for their wrongful acts. Their tongues uttered the false words and their purses should pay the damages. In this case the defendants constituted the whole proprietorship of the corporation, and they merely employed the corporate name the more effectually to accomplish their purposes against the complainant. The complainant is entitled to a decree abrogating his contract, and requiring the defendants to refund to him the sum paid under it, with interest, together with his taxed costs."⁷

A director of a corporation is not a trustee in the strict sense. The title to the corporate property is in the corporation, but the duties which a director is required to perform for the corporation which he represents are in many respects similar to the duties of a trustee and his relation to the corporation is in general essentially that of a trustee.⁸

The members of a committee, being themselves directors of the company as well as representatives of the board of directors, occupy the same fiduciary position as directors.⁹

A director or other officer or employee is under a contract implied from his confidential relation, not to disclose a trade secret, and will be enjoined from disclosing the same, and others, who induce him to disclose the secret, knowing that his disclosure is in violation of the confidence reposed in him, will be enjoined from making any use of the information so obtained, although they might have reached the same result independently by their own experiments or efforts. The disclosure

6—*Vliet v. Simanton*, 63 N. J. L. 458 (1899); *Booth ads. Wonderly*, 36 N. J. L. 250 (1873).

7—*Vreeland v. N. J. Stone Co.*, 29 N. J. Eq. 188 (1878); affirmed 29 N. J. Eq. 651 (Court of Errors & Appeals, 1878).

8—*Gardner v. Butler*, 30 N. J. Eq. 702 (1879); *Williams v. McKay*, 40 N. J. Eq. 189 (1885); *Guild v. Parker*, 43 N. J. L. 430 (1881); *Rabe v. Dunlap*, 51 N. J. Eq. 40 (1893); *Marr v. Marr*, 72 N. J. Eq. 797 (1907).

9—*Kelsey v. New England St. Ry. Co.*, 62 N. J. Eq. 742 (Court of Errors & Appeals, 1900).

necessarily made to the court does not deprive the complainants of their right to an injunction.¹⁰

Thus where a corporation purchased abroad a process for the successful detinning of tin scrap which was unknown in this country, the secret of which is zealously guarded, and after the success of the process had been demonstrated, one of the corporation's original directors, became the president of the defendant corporation, and with the assistance of certain discharged employees of the complainant installed for the defendant corporation as a competitor of the complainant the process so purchased by the latter, upon a bill filed to enjoin this inequitable competition and to restrain the further publication of the complainant's process, it was held that the quondam director of the complainant corporation should be enjoined because of his breach of trust, and that the defendant corporation should be enjoined because the knowledge of its president was imputable to it, and that the discharged employees of the complainant should be enjoined under the rule laid down in the case of *Stone v. Grasselli Chemical Co.* (65 N. J. Eq. 756).¹¹

A director occupies a position of trust or agency for his company of such character that all dealings between him and the company where his interest is opposed to that of the company, will be regarded with jealousy and suspicion, and subjected to the closest scrutiny and not sustained against the stockholders unless they are consistent with the utmost good faith and fair dealing on the part of the director.

Thus in *Marr v. Marr*, 73 N. J. Eq. 643 (1907), it was held by the Court of Errors and Appeals that where a director purchased at a sheriff's sale all the property of the company under executions issued at his suit, and for a consideration not exceeding one-half the value of the property, he took the title subject to an option on the part of his corporation to have the benefit of the purchase.

In *Raleigh v. Fitzpatrick*, 43 N. J. Eq. 501 (1887), it was held that where certain officers of a land company, which had assumed payment of a mortgage on lands purchased by it, bought the premises at a foreclosure sale for about the amount due the mortgagees thereon, they could not hold the title for their own benefit, but only as trustees for the complainant and the other corporators; and that a preliminary injunction restraining them from disposing of, or encumbering the lands should be continued.

As a general rule, the directors of a corporation are only required, in the management of its affairs, to keep within the limits of its powers, and to exercise good faith and honesty. They only undertake, by virtue of their assumption of the duties incumbent on them, to perform those duties according to the best of their judgment and with reasonable diligence, and a mere error of judgment will not subject them to personal

10—*Stone v. Grasselli Chemical Co.*, 65 N. J. Eq. 756 (Court of Errors & Appeals, 1903).

11—*Vulcan Detinning Co. v. American Can Co.*, 72 N. J. Eq. 387 (Court of Errors & Appeals, 1907).

liability for its consequences. And unless there has been some violation of the charter or the constating instruments of the company, or unless there is shown to be a want of good faith, or a wilful abuse of discretion, or negligence, there will be no personal liability. They are personally only bound in the management of the affairs of the corporation to use reasonable diligence and prudence, such as men usually exercise in the management of their own affairs of a similar nature.¹²

In *Williams v. McKay*, 40 N. J. Eq. 189 (Court of Errors and Appeals, 1885), Chief Justice Beasley said:

"The duty belonging to such a situation is a plain one—to care for the moneys entrusted to them in the manner provided in the charter, and to exercise ordinary care and prudence in so doing. It is true that the defendants were unpaid servants, but the duty of bringing to their office ordinary skill and vigilance was none the less on that account, for to this extent there is no distinction known to the law between a volunteer and a salaried agent."

For any wilful breach of their trust or misapplication of corporate funds, or for any gross neglect of, or inattention to, their official duties, directors are liable in the Court of Chancery. The liability is to the corporation in the first instance, where the corporation is capable of acting; but if it refuses to do so, then a person aggrieved may bring the suit. If the corporation be insolvent and its affairs in the hands of a receiver, he may maintain the litigation. If he refuses or is himself involved, a person aggrieved may sue. That is to say, primarily the corporation, or, if insolvent, its representative, must sue; but in case of their disability or refusal, a person aggrieved may bring the suit, making the corporation or its representative a defendant.¹³

In *Williams v. McDonald*, 42 N. J. Eq. 392 (Court of Errors and Appeals, 1886), it was held that the defendant, who was a director and member of the finance committee of a savings bank, which afterwards became insolvent, and a receiver was appointed, having acted with the president in investing its funds on mortgage on real estate, not worth at least double the amount of the sum invested above all incumbrances, against the prohibition in its charter, is chargeable with loss on the investment, and that it was not essential to allege and prove that he acted fraudulently, or that he derived any benefit from the loan; that it was sufficient to show that there was a culpable violation of duty as quasi trustee of the funds of the bank, by which loss was sustained.

And in *Citizens Building Association v. Coriell*, 34 N. J. Eq. 332 (1881), it was held that while the managers of a building and loan association are not personally liable for losses resulting from an honest mistake in estimating the value of stockholders' lands on which they

12—*Ackerman v. Halsey*, 37 N. J. Eq. 356 (1883); affirmed 38 N. J. Eq. 501 (Court of Errors & Appeals, 1884); see also *Williams v. McKay*, 40 N. J. Eq. 189 (Court of Errors & Appeals, 1885).

13—*Ackerman v. Halsey*, 37 N. J. Eq. 356 (1883); affirmed 38 N. J. Eq. 501 (Court of Errors & Appeals, 1884).

loaned money, nor for a defect in the acknowledgment of a mortgage, which rendered it worthless, they were liable for losses from loans made on personal security of the stockholders, in violation of a by-law limiting the amount of such loans.

The directors will be compelled in equity to account for profits illegally made by them out of their dealings with the corporation.¹⁴

And in cases where sales of property of the corporation are made to the directors the latter are charged with the full value of the property received, the contract price as fixed by the wrongdoers being entirely disregarded.¹⁵

All the parties guilty of the fraud need not be joined.¹⁶

And the court will discriminate among the directors and only hold those responsible for the wrongful acts who were trustees at the time of the commission of such acts.¹⁷

Where the bill charged that the defendant directors had improperly loaned corporate funds without adequate security, and that the receiver had been compelled to accept from the borrowers, in settlement of the loan, securities which then were, and ever since had been, worth a large sum less than the sum loaned, and sought to hold the defendants responsible for the loss, on demurrer to the bill it was held that a loss was sufficiently averred, although the securities were not yet turned into cash; that by settling with the borrowers for the loan, the receiver was not barred from his claim against the directors for their default; and that the borrowers were not necessary parties to the suit.¹⁸

In *Williams v. McKay*, 40 N. J. Eq. 189 (Court of Errors and Appeals, 1885), where the bill showed a long and systematic violation of the directions of the charter by the president and committeemen, the court held that it is a *prima facie* presumption that such course of misconduct was known to the directors, and that the latter cannot demur to the bill on the ground that such misconduct is not traced to them.

In cases where directors are wantonly and wilfully guilty of illegal and fraudulent acts, the doctrine of contribution cannot be invoked.¹⁹

A communication to a shareholder of a corporation, touching matters which concern the corporate body, are within the rule of privilege, which secures immunity to the official who makes the publication. "This court in *King v. Patterson*, 49 N. J. L. 417, declared 'that a communication, made *bona fide*, upon any subject matter in which the party

14—*Redmond v. Dickerson*, 9 N. J. Eq. 507 (Court of Errors & Appeals, 1853); *Citizens' Loan Association v. Lyon*, 29 N. J. Eq. 110 (1878); *Gardner v. Butler*, 30 N. J. Eq. 702 (Court of Errors & Appeals, 1879).

15—Cases last cited and *Wilkinson v. Bauerle*, 41 N. J. Eq. 635 (Court of Errors & Appeals, 1886).

16—*Stockton v. Anderson*, 40 N. J. Eq. 486 (1885); cited with approval in *Trenton Passenger Railway Co. v. Wilson*, 53 N. J. Eq. 577 (1895).

17—*Ackerman v. Halsey*, 37 N. J. Eq. 356 (Chancellor Runyon, 1883); *Barry v. Moeller*, 68 N. J. Eq. 483 (1904).

18—*Dodd v. Wilkinson*, 41 N. J. Eq. 566 (Court of Errors & Appeals, 1886).

19—*Wilkinson v. Dodd*, 40 N. J. Eq. 123 (1885).

communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty, although it contain crimimatory matter which, without this privilege, would be actionable.' In the case cited, 'the learned judge who delivered the opinion of the court referred, with approbation, to *Lawless v. Anglo-Egyptian Oil Company*, L. R. 4 Q. B. Div. 262, and to *P. W. & B. R. R. Co. v. Quigley*, 21 How. 202. The first of these cases was an action for libel against a corporation for publishing a report made to the company by auditors in their audit of the manager's accounts, reflecting upon the plaintiff. The report was submitted at a general meeting of the shareholders of the company, and under a resolution of the meeting was printed and circulated among the shareholders. The court held that, inasmuch as it was the interest of all the shareholders to be informed of the report, the publication was privileged, on the ground, as Meller, J., said, 'that to print the report was a necessary and reasonable mode of communicating it to all the shareholders, who must be more or less numerous.' In the second case, a report, made to stockholders in writing, and printed, with respect to the capacity and skill of one of the company's employees, was held to be a privileged communication." ²⁰

"The rule that directors cannot lawfully enter into a contract, in the benefit of which even one of their number participates without the knowledge and consent of the stockholders, is so firmly entrenched in our jurisprudence that it is not open to debate." ²¹

In the leading case on this subject Mr. Justice Dixon said: "After an examination of all the cases cited, and such others as I have found, and a careful consideration of the principle and the results of regarding and of disregarding it, I have come to the conviction that the true legal rule is that such a contract is not void, but voidable, to be avoided at the option of the *cestui que trust*, exercised within a reasonable time. I can see no further safe modification or relaxation of the principle than this. A director of a corporation may have rights not arising out of express contract such as the right to pass over its railroad, or transport his goods over its canal, upon paying reasonable tolls, or to have money which he has loaned it repaid to him; but where the right is one which must stand, if at all, upon an express contract, and which does not arise by operation or implication of law, then he shall not

20—*Rothholz v. Dunkle*, 53 N. J. L. 438 (Court of Errors & Appeals, 1891).

21—*United States Steel Corporation v. Hodge*, 64 N. J. Eq. 807 (Court of Errors & Appeals, 1903); citing *Staats v. Bergen*, 17 N. J. Eq. 554 (Court of Errors & Appeals, 1867); *Winans v. Crane*, 36 N. J. Law, 394 (1873); *Stroud v. Consumers Water Co.*, 56 N. J. Law, 422 (1894); *Gardner v. Butler*, 30 N. J. Eq. 702 (Court of Errors & Appeals, 1879); *Guild v. Parker*, 43 N. J. Law, 430 (Court of Errors & Appeals, 1881); *Stewart v. Lehigh Valley Railroad Co.*, 38 N. J. Law, 505 (Court of Errors & Appeals, 1875); *Traction Co. v. Board of Works*, 56 N. J. Law, 431 (1894); *Booth v. Land Filling Co.*, 68 N. J. Eq. 536 (1904).

hold it against the will of his cestui que trust; for in the very bargain which gave rise to it, in which he should have kept in view the interest of that *cestui que trust*, there intervened before his eyes the opposing interest of himself. The vice which inheres in the judgment of a judge in his own cause, contaminates the contract; the mind of the director or trustee is the forum in which he and his cestui que trust are urging their rival claims, and when his opposing litigant appeals from the judgment there pronounced, that judgment must fall. It matters not that the contract seems a fair one. Fraud is too cunning and evasive for courts to establish a rule that invites its presence. There may be isolated cases in which the trustee is willing to make a contract on more favorable terms for the cestui que trust than anyone else, but the opportunities for self-advancement, at the expense of those whose concerns he has in charge, and under circumstances where concealment is easy, are so much more numerous than these isolated cases, that in declaring a rule the latter are not worthy of consideration. Nor is it proper for one of a board of directors to support his contract with his company, upon the ground that he abstained from participating as director in the negotiations for and final adoption of the bargain by his co-directors, the very words in which he asserts his right declare his wrong; he ought to have participated, and in the interests of the stockholders, and if he did not, and they have thereby suffered loss, of which they shall be the judges, he must restore the rights he has obtained—he must hold against them no advantage that he has got through neglect of his duty toward them. Many authorities exemplifying the rule may be found.”²²

“The rule is imbedded in our jurisprudence, and it cannot be too strongly stated or too rigorously applied. But in the cases cited, the contract was made by the trustee without the knowledge or consent of the cestui que trust and without subsequent ratification or adoption by which the vice in it could be cured. The object of the rule is to prevent directors from secretly using their fiduciary position for their own emolument, and not to impair the right of stockholders to enter into any lawful engagement with a full disclosure of the facts.”²³

Directors of a corporation who participate in sales of the company's property to themselves, may be required at the suit of stockholders to account therefor and pay to the corporation the difference between what was paid and the cost in each instance, plus a profit to be determined by the facts in the case. It has been held that the period of accounting is properly extended back over a period of at least six years from the time of bringing suit, that coinciding with the period for which recovery might be had in an action at law.²⁴

22—*Stewart v. Lehigh Valley R. R. Co.*, 38 N. J. L. 505 (Court of Errors & Appeals, 1875).

23—*United States Steel Corporation v. Hodge*, 64 N. J. Eq. 307 (Court of Errors & Appeals, 1903).

24—*Barry v. Moeller*, 68 N. J. Eq. 483 (1904).

In *Voorhees v. Nixon* (72 N. J. Eq. 791), Vice-Chancellor Leaming held that a contract for the sale of property by the wife of a director of a corporation to the corporation, may be set aside by the corporation at its option after the contract is executed. In the Court of Errors and Appeals (73 N. J. Eq. 673 [1908]), however, Chief Justice Gummere writing for the court, said: "We do not find it necessary to accede to or dissent from the view that a contract for the sale of property by the wife of a director of a corporation to the corporation, may be set aside by the corporation at its option after the contract is executed, for we concur in the conclusion of the vice-chancellor that the proofs show Mr. Malott and not his wife to have been the real party in the transaction under investigation, and for that reason we think the receiver is entitled to relief against the unconscionable sale."

A contract of sale to a corporation of shares of its stock by a director present at the meeting of the board at which the sale was sanctioned is not binding as a valid obligation. But if the stock be retained or its value changed by action of the company so that it cannot be tendered back, though in the same condition, the company will be obliged to pay what it was reasonably worth. Vice-Chancellor Stevens said: "It comes within the principle of *Gardner v. Butler*, 3 Stew. Eq. 702. Oliver and his brother were directors present at the meeting of the board at which the sale of the stock was sanctioned. Speaking of a case thus circumstanced, Mr. Justice Van Syckel, in the case cited says: 'The rule is that the trustee cannot fortify himself by a contract which he makes with himself or for his own benefit, and set it up either at law or in equity as a valid obligation. It is of no binding force as a contract, and the cestui que trust may repudiate it at will. But while the express undertaking is without legal force, the directors of a company have a right to serve it in the capacity of officers, agents or employees, and for such service the law will enable them to recover a just and reasonable compensation. * * * No claim which they may make against their company can acquire any support from the fact that they have expressly sanctioned it. It must rest exclusively upon its fairness and justice and be enforced upon the quantum meruit.' Referring to the case of the *Aberdeen Railway Co. v. Blaikie*, he says, further on: 'If the action (in that case) had been brought to recover for the chairs which had been delivered and accepted, I apprehend it would not have been held in any court that the company could have retained the property and refused to pay for it, not the contract price, but what it was reasonably worth. * * * The same principle must apply whether it is property conveyed or services rendered to the company. The cupidity and avarice of the trustee is guarded against by giving the cestui que trust the right to repudiate the contract at all times, where it is executory, and to allow simply a just remuneration without reference to the contract price, where it is executed.' In the *Berger Case*, stock is said to have been put by our statute upon the footing of other property, and so the rule laid down in the case of

Gardner v. Butler is directly applicable. The company must pay for it, not the contract price, but what at the time of the sale, it was reasonably worth." ²⁵

The directors of a company have a right to serve it in the capacity of officers, agents or employees, and for such services the law will enable them to recover a just and reasonable compensation. The law restrains them from making a contract where their own gain intervenes between their exercise of judgment and their duty as trustees, but it does not operate to deprive the company of the service of those who, in many cases, may well possess the skill requisite to the successful management and conduct of the corporate business, and who may have the chiefest interest in its prosperity. Stockholders, because they are directors, are not compelled to commit the success of their company to strangers, or else render their own services gratuitously. No claim which they may make against their company can acquire any support or validity from the fact that they have expressly sanctioned it; it must rest exclusively upon its fairness and justice, and be enforced upon the quantum meruit. "The right of a trustee to recover on the quantum meruit, where the contract is illegal, is recognized in our courts."²⁶ The case resolves itself, then, into this question: Have the directors, whose action is the subject of controversy, retained for their services more than they are justly and reasonably entitled to? The burden is on them to show what they reasonably deserve to have, and no unjust exaction will be permitted."²⁷

But to support such a recovery there must be proof showing that the claimant was employed by the company to do certain work, that he did it, and that he deserves to be paid therefor the sum which in the judgment should be awarded him."²⁸

"Whether a transaction between two corporations has been accomplished or remains executory, I incline strongly to believe that the safe rule in most cases in the end will be found to be that the presence of a director or directors on both sides of the transaction under investigation does not give the dissenting stockholders an arbitrary right to an injunction, but may give him a most ample right to subject the transaction to the scrutiny of the court, and may cast upon the cor-

25—*Oliver v. Rahway Ice Co.*, 64 N. J. Eq. 596 (1903).

26—Citing *Mulford v. Minch*, 11 N. J. Eq. 16 (1855); *Huston v. Cassidy*, 2 Beas. 228; *Smith v. Drake*, 23 N. J. Eq. 302 (1873); *Stratton v. Allen*, 16 N. J. Eq. 229 (1863).

27—*Gardner v. Butler*, 30 N. J. Eq. 702 (Court of Errors & Appeals, 1879); see also *Fougeray v. Cord*, 50 N. J. Eq. 185 (1892); *S. C.* 50 N. J. Eq. 756 (1893); *Davis v. Thomas & Davis Co.*, 63 N. J. Eq. 572 (1902); *Hayes v. Pierson*, 65 N. J. Eq. 353 (Court of Errors & Appeals, 1899); *Lillard v. Oil, Paint & Drug Co.*, 70 N. J. Eq. 197 (1903); *Booth v. Land Filling, etc., Co.*, 68 N. J. Eq. 536 (1905); *Raynolds v. Diamond Mills Paper Co.*, 69 N. J. Eq. 299 (1905); *Mitchell v. United Box Board & Paper Co.*, 72 N. J. Eq. 580 (1907).

28—*Porch v. Agnew Co.*, 70 N. J. Eq. 328 (1905); affirmed 71 N. J. Eq. 305 (Court of Errors & Appeals, 1906).

porations or directors concerned the burden of disclosing and justifying the transaction. To give the dissenting stockholder the arbitrary right to an injunction in this class of cases often will put a deadly weapon in the hands of the blackmailer and the corporation 'striker.' Such a rule tends to drive the actual wrongdoers to cover, to induce them to seek concealment, while the corporate action is accomplished through apparently impartial directors, who are, in fact, only agents or 'dummies.' In several recent cases before this court, where the existence of common directors was relied on for injunctive relief, these common directors, while the motion was pending, were made to disappear, and apparently impartial directors took their place, who proceeded solemnly to approve of the action of the old boards which the injunction was designed to restrain. The fiction of corporate existence goes down in many cases before a charge of fraud, but I incline to think that this fiction, in most cases belonging to the class under consideration, should be rigidly maintained to defeat a mere arbitrary demand on the part of a stockholder that a corporate transaction should be enjoined even though all the impartial directors of the corporation and nine-tenths of the stockholders come into court with a demonstration that the transaction was advantageous in all respects to their corporation, and that an injunction upon it would cause great loss."²⁹

In *Metropolitan Telephone Co. v. Domestic Telegraph Co.*, 44 N. J. Eq. 568 (1888) the Court of Errors and Appeals said:

"Mr. Harrison occupied a similar fiduciary relation to each of the two companies. In performing his duty as a member of the committee of the Bell company he was required to use his judgment in fixing the terms of the contract with the Domestic company, in which he was interested. To sustain his capacity to do this would be like permitting one to be judge in his own case. Had the contract been executed or entered into without objection, it would no doubt have not been void, but, at the most, only voidable. Perhaps a contract between two incorporated companies may be sustained, where a minority of the directors of one are directors and interested in the other company, as has been done elsewhere. But the point now under discussion relates solely to the power of Harrison to take part in settling the terms of a contract in which he was adversely interested. In my judgment he was incapacitated so to do, and so no quorum of the committee was present capable of acting.

An injunction will not issue to prevent two corporations from entering into a contract on the sole ground that a minority of the directors of one of the directing corporations owned stock in a third corporation which owns stock in the other contracting corporation. The court will not prevent such corporations from contracting with each other until it appears that the proposed contract is inequitable or unfair.³⁰

²⁹—Vice-Chancellor Stevenson in *Robotham v. Prudential Insurance Co.*, 64 N. J. Eq. 673 (1903).

³⁰—*Pierce v. Old Dominion, etc., Smelting Co.*, 67 N. J. Eq. 399 (1904).

"It is insisted that the rules of equity in regard to common directors are applicable to all the contracts and business relations between the two original mining companies, and that by those well-settled rules all such contracts are voidable at the option of the complainant, a non-assenting stockholder, and the complainant undertakes to exercise his option in advance and have all contracts between the two corporations prohibited by an injunction. The first answer to this objection is that the two corporations have no common directors. The fact that their boards may be, and undoubtedly are, appointed by this holding company, does not subject the government of the two companies to a common control. The complainant's argument implies that the directors of the holding company will appoint 'dummies' as directors of each of the two original companies, so that in fact the directors of the holding company will be the directors of both of the other companies. The proofs, however, utterly fail to establish any such situation. The answer and accompanying affidavits most positively deny that any such condition in fact exists. * * * I know of no case, certainly none has been cited, where a single non-assenting stockholder of a corporation has been allowed to exercise the arbitrary option to procure from a court of equity an injunction prohibiting the carrying out of a contract between his corporation and another corporation, the fairness of which is in no way questioned, upon the sole ground that one director, or any number of directors less than a majority of his company, own stock in a third corporation, which third corporation owns stock in the corporation with which the board of directors of the corporation of such non-assenting stockholder had undertaken to contract."³¹

Such a contract is voidable at the option of the corporation, but is not void per se. When the facts are disclosed to the stockholders it may be subsequently ratified by them. The shareholders may, within a reasonable time after the disclosure to them of the interest of a director, elect to avoid the contract; but if an unreasonable time is allowed to elapse without exercising such option, during which the position of directors become so changed that it would be inequitable to vacate the engagement, equity will refuse to interpose.³²

The board of directors, the majority of which were members of the board which authorized the contract between one of the directors and the corporation at a meeting at which such director was present, cannot ratify it. Vice-Chancellor Stevens said: "That majority could not, consciously or unconsciously, ratify its own illegal act. The ratification must necessarily come from the principal, and not from the unauthorized agent. Here the principal is the corporation itself—the whole body of the stockholders. It is not pretended that this body as such, or duly authorized representatives of this body, ratified the

31—*Pierce v. Old Dominion, etc., Smelting Co.*, 67 N. J. Eq. 399 (1904).

32—*United States Steel Corporation v. Hodge*, 64 N. J. Eq. 807 (Court of Errors & Appeals, 1903); *Mitchell v. United Box Board & Paper Co.*, 72 N. J. Eq. 580 (1907).

transaction otherwise than by its silence; and this silence has not been sufficiently long continued to be evidence of acquiescence, and hence of ratification, assuming, notwithstanding the language of the court in the Gardner-Butler Case, that the ordinary rule relating to ratification by acquiescence is applicable to cases like the present. Only two years and a little over a month intervened between the making of the mortgage and the bringing of this suit. In the Gardner-Butler Case the stockholders, with full knowledge of the facts (see chancellor's opinion, 3 Stew. Eq. 710), remained silent from January, 1868, to May, 1871, and although the chancellor called attention to the delay and laid stress upon it, it was not considered by the court of errors to be material. There must be a reference to ascertain the value of the stock at the time it was purchased. I do not think the company could with any more reason tender it back now, with another mortgage put upon the property, than the Aberdeen company, in the case mentioned by Mr. Justice Van Syckel, could have tendered back the chairs after using them." ³³

When the contract is entered into by the stockholders with the directors, or when the stockholders expressly authorize the directors to enter into a contract, and the stockholders have notice of the directors' interest, the agreement will be unassailable in the absence of actual fraud or want of power in the corporation.³⁴

"In *United States Steel Corporation v. Hodge*, 64 N. J. Eq. 807, 811, referring to a by-law of the corporation that provided for the submission of any contract of the directors to a meeting of the stockholders for their approval, Mr. Justice Van Syckel speaking for this court said: 'This by-law cannot amplify the powers of the corporation or operate to validate any act ultra vires the corporation, but it enabled the stockholders by a majority vote to ratify any contract which the entire body of stockholders or the corporation might lawfully make.'" ³⁵

The acceptance by a stockholder of a dividend upon his stock can be no ratification of the illegal conduct of the directors.³⁶

Three persons contemplating the formation of a corporation, entered an agreement which provided for their salaries as officers of the corporation and declared that they should be paid from the profits of the business and that the stockholders should be paid dividends before salaries were paid. The certificate of organization did not refer to the agreement, nor was it adopted at the first stockholders' meeting to organize the corporation. The three persons were elected directors, and at their meeting adopted a resolution providing that the dividends and salaries should be paid as specified in the agreement. In a suit by the

33—*Oliver v. Rahway Ice Co.*, 64 N. J. Eq. 596 (1903).

34—*United States Steel Corporation v. Hodge*, 64 N. J. Eq. 807 (Court of Errors & Appeals, 1903).

35—*Siegman v. Electric Vehicle Co.*, 72 N. J. Eq. 403 (Court of Errors & Appeals, 1907).

36—*Hilles v. Parrish*, 14 N. J. Eq. 380 (1862).

receiver on insolvency, seeking to recover assets to pay debts, it was held that he was not entitled to enforce the agreement for that purpose, and could not recover under it salaries paid from the capital with the acquiescence of the stockholders.³⁷

In *Ackerman v. Halsey*, 37 N. J. Eq. 356 (1883), the bill alleged generally that the defendant directors had utterly neglected to discharge their duty in every essential respect. It averred that they had the fullest opportunities and facilities for, and abundant means of, honestly and diligently performing their duties, and of knowing at all times the exact condition of the affairs of the bank, and of administering its affairs honestly and diligently as required by their oath, and for preventing the loss and injury complained of, and that a very moderate exercise and performance of the duties expected and required of them would have prevented the ruin of the bank and the consequent injury to the complainant; but that they utterly failed and neglected to perform their official duties and wholly omitted, without any reasonable excuse, to give any reasonable or proper personal attention to the business of the bank and the care and management of its concerns; and that in consequence of such neglect the bank has been utterly ruined, by having its funds abstracted and misapplied by its cashier, and its stock rendered worthless, to the injury of the complainant and its other creditors. It then proceeded to state particular derelictions of duty. It was held that particular instances of official misfeasance and carelessness, which standing alone might not fix personal liability, were sufficient, when connected with general allegations of official misconduct and culpable negligence, to sustain a bill in such case on general demurrer.³⁸

That some of the defendants have been directors longer than others is no ground of demurrer, because the court can discriminate between them, and hold those elected recently only liable for losses incurred during their term of office.³⁹

The court said: "But in a bill of this peculiar character, where the management of the affairs of a corporation, through a series of years, is the subject of litigation, and it appears on the face of the bill when the administration of each director began, the objection in question is not possessed of much weight. Each director will answer only for the period of his administration, and in making its decree the court will of course discriminate between those who are culpable and those who are not. In *Charitable Corp. v. Sutton*, 2 Atk. 400, a similar objection was made and considered. The suit was brought to be relieved against the defendants, fifty in number, who were either committeemen or in other offices of the corporation, and to obtain satisfaction for a breach

37—*Mills v. Hendershot*, 70 N. J. Eq. 258 (1905).

38—*Ackerman v. Halsey*, 37 N. J. Eq. 356 (1883); affirmed 38 N. J. Eq. 501 (Court of Errors & Appeals, 1884).

39—*Ackerman v. Halsey*, 37 N. J. Eq. 356 (1883); affirmed 38 N. J. Eq. 501 (Court of Errors & Appeals, 1884).

of trust, fraud and mismanagement. It was there urged that the court could make no decree against the defendants which would be just, for it was said that every man's attendance or omission of his duty was his own default, and that each particular person must bear such a proportion as would be suitable to the loss arising from his particular neglect, which made it (it was argued) a case out of the power of the court. The objection was not sustained. Lord Hardwicke dismissed the bill as to some of the defendants. As to others, he decreed that they were liable in the first place, and their associates secondarily." 40

A minority stockholder filed a bill against his corporation, its entire board of directors and other parties, the object of which was to protect the corporation by enjoining certain contracts or transactions into which the board of directors proposed to have the corporation enter. A preliminary injunction was refused upon grounds which largely involved the whole merits of the case. It was held that complainant was not entitled on the final hearing, to bring in separate grievances of the corporation against some of the defendants only who were directors of the corporation and obtain injunctive relief with reference to such grievances with which the other defendants were not concerned and which were not within the scope of the broad relief prayed for against all the defendants; that the complainant was not entitled, after most of the testimony in the cause had been taken, to set up by amendment to his bill a grievance against a part only of the defendants, which arose before the filing of the bill, or to set up by an addition to the bill under rule 210—a, such a grievance which arose after the filing of the bill; and that the decree dismissing the bill would be made without prejudice to the filing of any bill on behalf of the complainant in respect of the grievances so excluded from consideration.⁴¹

A bill filed by the receiver of an insolvent corporation, alleging various frauds by the treasurer and some of the directors, may be maintained against the treasurer alone, without joining as co-defendants all the directors and other persons who are alleged to have participated in the frauds.⁴²

In a suit in equity to charge a director of a corporation with dereliction and malfeasance in office, the statute of limitations does not apply.⁴³

In a suit by the receiver of a corporation against non-resident directors to recover money lost to it by reason of their negligence and improper conduct, the court can acquire no jurisdiction in personam by service by publication and mailing only. The court said: "It is further contended, or rather suggested, that the directors of a New Jersey

40—Ackerman v. Halsey, 37 N. J. Eq. 356 (1883); affirmed 38 N. J. Eq. 501 (Court of Errors & Appeals, 1884).

41—Pierce v. Old Dominion Copper Mining & Smelting Co., 72 N. J. Eq. 595 (1907).

42—Stockton v. Anderson, 40 N. J. Eq. 486 (1885).

43—Williams v. Reilly, 41 N. J. Eq. 137 (1886); Williams v. McKay, 40 N. J. Eq. 189 (1885).

corporation stand in respect of the protection guaranteed by the federal constitution upon a different footing from ordinary defendants. No case is cited in support of this proposition, and it seems to be unsound. The legislature has not attempted to put non-resident directors when they are sued for negligence on any different footing in respect to service of process, from any other class of persons when so sued. It has not sought to compel them to waive their constitutional privilege as a prerequisite to holding corporate office."

Where bonds of a corporation were not, owing to the character of the corporation's business, readily marketable, and unavailing efforts had been made to sell them to other parties than the creditor whose debt they were issued to secure, after which such creditor bought them at a price which was not unconscionable, though less than their face value, a director of the corporation was not, in the absence of fraud or unjust advantage, precluded from purchasing the creditor's interest in the bonds at their market value and recovering the face value of the bonds.⁴⁵

74. STATUTORY DUTIES AND LIABILITIES OF CORPORATE OFFICERS.

When the officers, directors or stockholders of any corporation shall be liable to pay the debts of the corporation, or any part thereof, any person to whom they are liable may have an action against any one or more of them; and the declaration shall state the claim against the corporation, and the ground on which the plaintiff expects to charge the defendants personally; or the person to whom they are liable may have his remedy by bill in chancery.¹

Any officer, director or stockholder who shall pay any debt of a corporation for which he is made liable by the provisions of this act, may recover the amount so paid, in an action against the corporation for money paid for its use, in which action only the property of the corporation shall be liable to be taken, and not the property of any stockholder.²

No sale or other satisfaction shall be had of the property of any director or stockholder for any debt of the corporation of which he is such director or stockholder till judgment be obtained therefor against such corporation and execution thereon returned unsatisfied, but any suit brought against any director or stockholder for such debt shall stay after execution levied, or other proceedings to acquire a lien, until such return shall have been made.³

44—Lanning v. Twining, 71 N. J. Eq. 573 (1906).

45—Camden Safe Deposit & Trust Co. v. Citizens' Ice & Cold Storage Co., 69 N. J. Eq. 718 (1905); affirmed 71 N. J. Eq. 221 (Court of Errors & Appeals, 1907).

1—Corporation Act, § 92.

2—Corporation Act, § 93.

3—Corporation Act, § 94.

It was held in an action against the directors of a corporation to enforce a liability under the Corporation Act for withdrawing a part of its capital stock, that where a judgment had been obtained against the corporation of which defendant was a director, it was not conclusive against the defendant as to the debt sued on, where it was obtained in another jurisdiction, and the only plea interposed by the corporation was one challenging the jurisdiction of the court.⁴

⁴—Audenried v. East Coast Milling Co., 68 N. J. Eq. 450 (1904). As to the form of declaration in an action against corporate officers to enforce a statutory liability, see Waters v. Quimby, 27 N. J. L. 296 (1859).

VII. CORPORATE POWERS AND LIABILITIES.

75. SOURCE, NATURE AND CLASSIFICATION OF THE POWERS OF CORPORATIONS.

It is a well settled rule, a cardinal rule of the law of corporations, that a corporation created by statute possesses no rights and can exercise no powers except such as are expressly given by statute or necessarily implied.¹

It is within the discretion of the legislature alone to prescribe the conditions upon which privileges and powers shall be exercised by corporations, and what shall constitute sufficient evidence of their right to do so, so long as no provision of the fundamental law is violated.²

"It is a familiar principle that corporations being the creatures of legislation, are precisely what their organic act makes them, and beyond that, nothing. They must act strictly within their limited sphere, and for every function they claim to exercise, they must find authority in legislative grant (2 Cr. 127)." Thus it was held that a water company which had the power under its charter to condemn lands and the power to obtain and secure by purchase the right to use, divert, and appropriate springs, streams or ponds of water, had no power to condemn the right to use water from a stream.³

The powers of a corporation are, strictly speaking, two-fold—those derived from express grant and those that are incident and necessarily appertaining to it, whether expressed in the grant or not. The power to make by-laws is incident, for a corporation must necessarily have laws to regulate its proceedings. Of the same character is the power to make and use a common seal; for the law anciently was, that a corporation could act and speak only by its common seal. The right to sue is also incident. In more modern times it has been usual to embrace all these incidental powers and privileges in the act of incorporation; so that it may now be considered as a pretty general rule that the powers of a corporation are regulated and defined by the act which gives it existence.⁴

In *Ellerman v. Chicago Junction Railways, etc., Co.*, 49 N. J. Eq. 217 (1891), Vice-Chancellor Green said:

"What limitation is then to be applied to the powers sought to be

1—*McCarter v. Vineland Light & Power Co.*, 73 N. J. Eq. 702 (Court of Errors & Appeals, 1908); *National Trust Co. v. Miller*, 33 N. J. Eq. 155 (1880); *Stockton v. Central Railroad Co.*, 50 N. J. Eq. 5 (1892); *North-western Fertilizing Co. v. Hyde Park*, 97 U. S. 659.

2—*Berger v. U. S. Steel Corporation*, 63 N. J. Eq. 809 (Court of Errors & Appeals, 1902).

3—*Watson v. Acquackanonck Water Co.*, 36 N. J. L. 195 (1873).

4—*Leggett v. N. J. Manufacturing, etc., Co.*, 1 N. J. Eq. 541 (1832); *Fifth Ward Savings Bank v. First National Bank*, 48 N. J. L. 513 (Court of Errors & Appeals, 1886).

secured by subdivisions 3 and 5 of paragraph 3, and can the agreement be brought within the provisions of the general Corporation act or the specifications of the certificate? The general act gives to all corporations general corporate powers and all others necessary to their exercise. If these were not sufficient to effect the objects of the corporation, recourse was formerly had to the legislature for a specific grant of power. The constitution providing that 'the legislature shall pass no special act conferring corporate powers, but shall pass general laws under which corporations may be organized and corporate powers of every nature obtained,' and the general Corporation act being, as it now stands, passed in obedience to the mandate of the constitution, the certificate required by that act becomes the charter of the company, and the equivalent of the former special act of the legislature. As amended, the Corporation act permits incorporations not only for objects specified therein but for 'any lawful business or purpose whatsoever,' which general clause is not, however, to be construed as embracing powers to do those things which would deprive the corporation of its ability to carry out the objects for which it was formed, or discharge any duties which it might under its charter owe to the public, or which are contrary to the policy of the law. (*Oregon Ry. Co. v. Oregonian Ry. Co.*, 130 U. S. 1.)

"By the statement, therefore, in the certificate of incorporation of the desired powers under the head of objects of the corporation, the special powers are obtained, and, as incident thereto, such others as may be necessary for their exercise. So that the general Corporation act confers on the company certain powers, the certificate contemplates others, and incidental powers follow not only with respect of the general but also of the special powers." ⁵

When we speak of the powers of a corporation we mean, when we use that term with scientific precision of expression, the capacities to act as a corporate body conferred upon it by the legislature, either directly, by direct grant as in the case of a special charter, or under general enabling acts, or indirectly, through the adoption by the incorporators of articles of incorporation, original or amended. We do not mean its right to act in a particular instance, as against the will of a dissentient member. The distinction is fundamental and its consequences are sometimes of the greatest importance. The legislature may authorize a class of corporations to do certain things, as, for example, to consolidate, to increase their capital stock, etc. The exercise of such power by a particular corporation, however, may be in violation of the contract rights of the members (see sections 19, 51, 52 and 53 above) and if the dissenting stockholder acts with promptness he may prevent the exercise of such power. But the act done in pursuance of such a statute is not void but voidable.

Thus, in *Mills v. Central Railroad Co.*, 41 N. J. Eq. 1 (1886), it was

⁵—*Ellerman v. Chicago Junction Railways, etc., Co.*, 49 N. J. Eq. 217 (1891).

held that a supplement to the general railroad law (P. L. 1880, p. 230), which provided that any railroad of this state may lease, consolidate or merge with any other railroad, does not authorize such lease by the directors against a minority of dissenting stockholders, so far as the latter's rights are affected thereby. The provision is merely a legislative authorization, a concession on the part of the legislature of power to do that which could not lawfully be done without such authority.⁶

76. STATUTORY POWERS OF CORPORATIONS IN GENERAL.

The Corporation Act provides (§ 1) that every corporation shall have power:

1. To have succession, by its corporate name, for the period limited in its charter or certificate of incorporation, and when no period is limited, perpetually;

2. To sue and be sued in any court of law or equity;

3. To make and use a common seal, and alter the same at pleasure;

4. To hold, purchase and convey such real and personal estate as the purposes of the corporation shall require, and all other real estate which shall have been bona fide conveyed or mortgaged to the said corporation by way of security, or in satisfaction of debts, or purchased at sales upon judgment or decree obtained for such debts; and to mortgage any such real or personal estate with its franchises; the power to hold real and personal estate shall include the power to take the same by devise or bequest;

5. To appoint such officers and agents as the business of the corporation shall require, and to allow them suitable compensation;

6. To make by-laws fixing and altering the number of its directors, and providing for the management of its property, the regulation and government of its affairs, and the transfer of its stock, with penalties for the breach thereof not exceeding twenty dollars;

7. To wind up and dissolve itself, or be wound up and dissolved in manner hereafter mentioned.¹

In addition to the powers enumerated in the first section of this act and the powers specified in its charter or in the act or certificate under which it was incorporated, every corporation, its officers, directors and stockholders, shall possess and exercise all the powers and privileges contained in this act, so far as the same are necessary or convenient to the attainment of the objects set forth in such charter or certificate of incorporation; and shall be governed by the provisions and be subject to the restrictions and liabilities in this act contained, so far as the same are appropriate to and not inconsistent with such charter or the act under which such corporation was formed; and no corporation

⁶—See also *Colgate v. United States Leather Co.*, 72 Atl. 126 (Court of Errors & Appeals, 1909); *Einstein v. Raritan Woolen Mills*, 74 N. J. Eq. 624 (1908).

¹—Corporation Act, § 1.

shall possess or exercise any other corporate powers, except such incidental powers as shall be necessary to the exercise of the powers so given.²

"An act concerning corporations, section three, passed in 1846, gives us an imperative rule of construction concerning corporate powers. It provides that, in addition to the powers enumerated in the first section of the act (which are the ordinary powers of all corporations), 'and to those expressly given in its charter, or in the act under which it is or shall be incorporated, no corporation shall possess or exercise any corporate powers except such as shall be necessary to the exercise of the powers so enumerated and given.' * * * The common law rule limits corporations to such powers as are given by the charter, or necessarily implied for carrying into effect the objects and powers expressly sanctioned. To that extent, at least, our statute is declaratory of that rule; but beyond that, the language is clear, that the legislature intended to interdict, as a matter of public policy, the exercise of any powers except such as are referred to in that third section. Whether without that section the common law would fully reach up to that measure upon any implication that powers not so granted or implied are prohibited, need not now be determined. It is sufficient that the terms of this enactment are plain and its meaning cannot be misunderstood, and that when a corporation exercises powers outside of those permitted by that section, its action is obnoxious to the charge that there is not only a want of authority, but that it is against an express enactment. The construction of corporate powers should, undoubtedly, be reasonable, and so as to accomplish and not to defeat, the purpose and true intent of the charter, in its full spirit and scope. * * * There are many reasons not now useful to mention, why, in justice to the state, the public, and the stockholders, and the very stability of the corporate body, the legislature should be jealous of its grants of franchise, and seek to confine them within definite limits, and to disallow any corporate act outside of them. The legislature has a policy in this matter. It is clearly declared; and that third section must be taken as a prohibition of any acts not within the scope of the powers permitted. Contracts in contravention of it are against the declared policy of the state, and must be held to be illegal, and of no binding obligation."³

"Power necessary to a corporation does not mean simply power which is indispensable. Such phraseology has never been interpreted in so narrow a sense. There are few powers which are, in the strict sense, absolutely necessary to those artificial persons, and to concede to them powers only of such a character, while it might not entirely paralyze, would very greatly embarrass their operations. Such, in similar cases,

²—Corporation Act, § 2.

³—*Morris & Essex Railroad Co. v. Sussex Railroad Co.*, 20 N. J. Eq. 542 (Court of Errors & Appeals, 1869).

has never been the legal acceptance of this term. A power which is obviously appropriate, and convenient to carry into effect a franchise granted, has always been deemed a necessary one."⁴

77. CONSTRUCTION AND INTERPRETATION OF CORPORATE CHARTERS, AND LEGISLATIVE ACTS GRANTING POWERS TO OR REGULATING CORPORATIONS.

It is a well settled rule of construction that public grants are to be construed strictly; and in all cases of grants of franchises by the public to a private corporation, the established rule of construction is that any ambiguity in the terms of the contract must operate against the corporation, and in favor of the public. The corporation takes nothing that is not fairly given by the act.¹

"The rule of construction is settled, that what is not clearly granted is withheld. In *Townsend v. Brown*, 4 Zab. 87, Chief Justice Green says, that 'it is a rule of construction no less wise than clear, that in all cases of public grants, the interpretation shall be most favorable to the public, and most strongly against the grantee. The rule is founded in wisdom. All experience teaches that public rights are yielded to private interests with sufficient alacrity.' * * * And in a later case, reported in 1 C. E. Green, 372, the same great jurist says, that 'any ambiguity in the terms of the grant must operate against the corporation, and in favor of the public. The corporation takes nothing that is not clearly given by the act.' In language equally strong, the Court, in 9 Harris, 22, hold, that 'in the construction of a charter, to be in doubt is to be resolved, and every resolution which springs from doubt is against the corporation. This is the rule sustained by all the courts in this country and in England.'" ²

"Although grants of corporate powers are to be strictly construed, yet they are not to be so construed as to defeat the object of the grant; and hence all such powers, in addition to those expressly granted, are strictly incidental and necessary to that object are implied." ³

The interpretation must nevertheless be reasonable and in accordance with the spirit and purpose of the law.⁴

"There have been a number of decisions which have, under special circumstances, held that neither the exact time nor the exact mode

4—*Beasley, C. J., in State New Jersey R. R. & Trans. Co. v. Hancock, Collector*, 35 N. J. L. 537 (Court of Errors & Appeals, 1871); *Ellerman v. Chicago Junction Railways, etc., Co.*, 49 N. J. Eq. 217 (1891).

1—*D. & R. Canal Co. & C. & A. R. & T. Co. v. R. & D. Bay R. Co.*, 16 N. J. Eq. 321 (1863); *Camden & Amboy R. R. Co. v. Briggs*, 22 N. J. L. 623 (Court of Errors & Appeals, 1850); *Morris Canal & Banking Co. v. Central R. R. Co.*, 16 N. J. Eq. 419 (1863).

2—*Black v. Delaware & Raritan Canal Co.*, 24 N. J. Eq. 455 (Court of Errors & Appeals, 1873).

3—*Potts, J., in The State v. Commissioners of Mansfield*, 23 N. J. L. 510 (1852).

4—*State v. Passaic Turnpike Co.*, 27 N. J. L. 217 (1858).

prescribed by statutes for the doing of acts directed to be done, is necessarily essential to the validity of the transaction. Upon looking into the cases referred to, and on an examination of others standing in the same line, I find they all rest upon the common principle that the legislative will is to be ascertained not from the meaning of the text of the statute alone, but from such words interpreted in view of the general object of the particular act. The adjudications are the results, not of acts of interpretation, which is the mere finding of the true sense of the special form of words used, but of acts of *construction*, which Dr. Lieber, in his *Hermeneutics*, has properly defined 'as the drawing of conclusions respecting subjects that lie beyond the direct expression of the text—conclusions which are in the spirit, though not within the letter of the text.' (*Lieber on Political Hermeneutics*, Chap. 1.) In the class of cases now under consideration, the absolute meaning of the terms employed have been for the most part clear; but in their application to the subject matter, or in view of the paramount object of the lawmaker, they have been deprived of some of their usual force and restricted in their operation. Such results have obtained because it has appeared to the courts, looking at the statutory language and its effect, that it was manifest that it could not have been the design of those who enacted the law, to give the words the very power which they inherently possess. When an act is authorized or directed to be done by a written law, and the time and modes of doing such act are declared, it must, of necessity, oftentimes, be a question, in each particular instance, whether the time or mode so declared was so material in the eyes of the lawmaker, that he has made either an indispensable part of the affair. This idea is expressed by Lord Mansfield in the case of *Rex v. Loxdale*, 1 Burr. 447, in which he says: "There is a known distinction between circumstances which are of the essence of a thing required to be done by an act of Parliament, and clauses merely *directory*.' What has been made a matter of the essence of the thing, can be ascertained only by judicial construction." ⁵

78. THE DOCTRINE OF ULTRA VIRES.

"Not a trace of the modern doctrine of ultra vires is to be found before the present [nineteenth] century." ¹

The expression "ultra vires" is used in different senses—to express either that the act of the directors or officers is in excess of their authority as agents of the corporation, or that the act of the majority of the stockholders is in violation of the rights of the minority, or that the act has not been done in conformity with the requirements of the charter, or that the act is one that the corporation itself has not the capacity to do, as being in excess of its corporate powers. The indis-

⁵—Beasley, C. J., in *Proprietors of Morris Aqueduct v. Jones*, 36 N. J. L. 206, 208 (1873).

¹—Professor Williston in *Select Essays in Anglo-American Legal History*, vol. III, p. 232.

criminate use of this expression, with respect to cases different in their nature and principles, has led to considerable confusion. Where the act done by directors or officers is simply beyond the powers of the of the executive department of the corporation as the agency by which the corporation exercises its functions, and not of the corporation itself, it may be made valid and binding by the action of the board of directors, or by the approval of the stockholders. Where the act done by stockholders is not in excess of the powers of the corporation itself, but is simply an infringement upon the rights of other stockholders, it may be made binding upon the latter by ratification or by consent implied from acquiescence. Where the infirmity of the act does not consist in a want of corporate power to do it, but in the disregard of formalities prescribed, it may or may not be valid as to third persons dealing bona fide with the corporation, according to the nature of the formality not observed, or the consequences the legislature has imposed upon non-observance. These are all cases depending upon legal principles, not peculiarly applicable to corporations, and the use of the phrase *ultra vires* tends to confusion and misapprehension. In its legitimate use, the expression *ultra vires* should be applied only to such acts as are beyond the powers of the corporation itself.²

"The rule is well settled, both in England and in this country, that an executory contract, *ultra vires*, cannot be validated by the acquiescence of every stockholder of the company. It is also generally conceded that an *ultra vires* contract fully executed cannot be rescinded from. The courts have differed upon the question whether the plea of *ultra vires* is available by a corporation in an action brought against it for not performing its side of the contract, where the transaction is complete and nothing remains to be done by the parties seeking relief.

* * *

"In the conflict of judicial decision on this subject, this Court may adopt and should adopt the rule which will produce the best results in the administration of justice. In my judgment the true rule is that when the transaction is complete and the party seeking relief has performed on his part, the plea of *ultra vires* by the corporation which has acquiesced in it, is inadmissible in an action brought against it for not performing its side of the contract, in all those instances where the party who has performed cannot, upon rescission, be restored to his former status.

"In the cases maintaining the contrary doctrine, the reasoning of the Courts has been:

"1. That corporators might, by ratifying corporate acts by their acquiescence, indefinitely extend and amplify their granted powers.

"2. That consent on the part of those who do an act which they have no power to do cannot make it legal.

2—Depue, J., in *Camden & Atlantic R. R. Co. v. Mays Landing, etc., R. R. Co.*, 48 N. J. L. 530 (1886).

"3. That to hold that an act performed in executing a void contract makes all its parts valid, is to say that the more that is done under an unauthorized contract the stronger is the claim to its enforcement by the courts.

"To the first objection a sufficient answer is that the state may interpose its authority at any time and compel an abandonment of the act in excess of power, and, if need be, revoke the charter of the company for its usurpation.

"When the state challenges the legality of the transaction, the paramount and only question is whether it has bestowed upon the company the requisite authority to engage in it. When the question arises between the company and the other party to the contract, other legal principles apply in determining whether the contract shall be observed. It will be admitted that where there is an absence of authority on the part of a corporation to do an act, the requisite power cannot be imported into the transaction, either by the consent of stockholders or by the execution of the contract by the other party to the agreement. The contract must necessarily continue to be *ultra vires*. No such effect has been attributed in any of the cases to acquiescence or unilateral performance. The basis upon which enforcement of the contract in such cases rests is that the company is estopped from setting up its own unauthorized act, and its own incapacity, to evade performance on its part, after receiving the fruits of the bargain. The power of the company is not amplified, the agreement is none the more legal, in the sense that there was authority to execute it; the court simply refuses to entertain the defence, which common honesty forbids the company to make. A man may become bound by the act of an unauthorized agent, and be held liable to the contract made for him, not on the ground that the agent in fact had any authority, but for some conduct on the part of the alleged principal which precludes him from raising the question of authority.

"No reason is perceived why the rules of fair dealing which are so rigorously applied to natural persons, shall not pertain as strictly to private corporations. No instance is known where a natural person can set up in his own behalf, and for his own advantage, his want of authority to do an act for which he has received a consideration from the other party. Transactions which are immoral, illegal, forbidden by statute, or contrary to public policy, are not embraced in this discussion; they cannot furnish the basis for a legal cause of action.

"Why is it that *extra vires* contracts are recognized as unassailable, and are permitted to stand as the foundation of rights acquired under them, after they have been executed on both sides? * * *

"Apply to it what legal phrase you may, the underlying principle is that the corporation cannot set up its own infirmity when it is unconscionable to do so. The law forbids the defence on account of the flagrant injustice which would otherwise be done. The question of

corporate power is not entertained. * * * Misconception arises from failing to distinguish between those rights which parties acquire as between themselves, and the rule by which corporate authority must be measured and limited when the state interposes to assert its prerogative. Nor does the liability of the company rest upon the doctrine of ratification. In its ordinary legal acceptation ratification applies to such contracts as the party has authority to make. Repeated affirmations of a contract by one who has no authority to enter into it, cannot supply the requisite authority."³

The doctrine of *ultra vires*, where it concerns purely a matter of business management of the corporate property by the directors or by the company, and where the power is called in question by a stockholder, must be applied reasonably and not unreasonably. The rule applied in these cases is the one announced by Lord Selbourne in the House of Lords in *Attorney-General v. Great Eastern Railway Co.*, 6 App. Cas. 572, 49 L. J. (N. S.) Eq. 545, 547 (1880), and approved by Vice-Chancellor Green in *Ellerman v. Chicago Junction Railroad Co.*, 4 Dick. Ch. Rep. 217. This rule is, that whatever may be fairly and reasonably regarded as incidental to, or consequential upon, those things which the legislature has authorized, ought not (unless expressly prohibited) to be held by judicial construction to be *ultra vires*.⁴

In *Elkins v. Camden & Atlantic R. R. Co.*, 36 N. J. Eq. 5 (1882), the directors of a railroad company, without any authority either by statute or charter, passed a resolution to assume certain debts and to buy a majority of the stock and bonds and the equipment of a rival railroad. The resolutions also provided for the calling of a special meeting of the stockholders to vote upon the matter, and it was not to be carried out without their approval. The Court of Chancery held—

(1) That the proposed purchase was *ultra vires*, and hence could not be executed even if ratified by the stockholders.

(2) That it was void and against public policy, in that its object was to prevent lawful competition.

(3) That it could be enjoined, upon the application of a single stockholder of the purchasing company, and that the fact that such stockholder had obtained his stock after the passage of the resolution, and with the avowed design of preventing its consummation, would not affect his right to relief.

While it is true that when the state challenges the action of one of its corporate creations it may insist on a clear warrant for its action, the application of the doctrine of *ultra vires* to the acts of a purely private corporation having no public functions or duties, in suits by individuals, is not by an inflexible rule—it yields not only to necessity, but to transactions incidental to prescribed powers. In such cases the

3—*Camden & Atlantic R. R. Co. v. Mays Landing, etc.*, 48 N. J. L. 530, 561 (Court of Errors & Appeals, 1886).

4—*Dittman v. Distilling Co. of America*, 64 N. J. Eq. 537 (1903).

doctrine of ultra vires is reasonably, and not unreasonably, understood and applied, and whatever may be fairly regarded as incidental to, and consequential upon, those acts which are authorized by the charter of the company, is not (unless expressly prohibited) held by judicial construction to be ultra vires. "It should be borne in mind that the Junction Company is a trading corporation not engaged in any public business or owing any public duty or exercising any franchise of eminent domain. Its operations under its charter might be entirely suspended without detriment to a single public interest, and it would seem that in the making of this agreement all that was involved was the partnership relation between the shareholders of a company."⁵

Thus where it was alleged that a corporation organized for the purpose of purchasing and holding stock in other corporations was illegal, as organized to create a monopoly, but it appeared that such monopoly, if any existed, arose from the exercise of the powers conferred on the corporation by its charter or certificate of organization, it was held that such question could not be determined in a court of equity at the suit of a stockholder, but could only be considered on quo warranto, on relation of the attorney-general, to oust the corporation from its franchises.⁶

"But, says the complainant, the result of a consolidation of the two companies will be an illegal combination in restraint of trade. On this topic I refer to what was said by me, and which, presumably, had the approval of the court of errors and appeals, in the case of *Meredith v. Zinc Company*, 10 Dick. Ch. Rep. 211. The defendant is engaged in a business that does not include the exercise of any public franchise, and it may do what any individual may do. Such was declared to be the law in the case of *Attorney-General v. American Tobacco Co.*, 10 Dick. Ch. Rep. 352. Neither of the companies mentioned here has any monopoly of either sugar or coffee. The world's product of each is immense. Any person can go into the market and buy either of them in unlimited quantities. Either of the companies mentioned in the complainant's bill may stop manufacturing at any time they choose, and the public has no right to complain. Either of them may sell their goods at such price as they choose to put on them, and the public has no right to complain. There can be, in my judgment, no foundation, either in morals or law, for interfering with the liberty of the citizen who owns a factory to operate it or not as he may choose, and to sell his goods or not as he may choose, at such price as he may choose. In other words, as I remarked in *Meredith v. Zinc Company*: 'By the law of the land' the defendant and Arbuckle Brothers 'have the right to exercise their own judgment as to when, if ever, and how they will spend their money in preparing their property for market and rendering it fit for use by mankind. I am unable to find any foundation, either

⁵—*Ellerman v. Chicago Junction Railways, etc., Co.*, 49 N. J. Eq. 217 (1891).

⁶—*Dittman v. Distilling Co. of America*, 64 N. J. Eq. 537 (1903).

in law or in morals, for the notion that the public has the right to have these private owners of this sort of property continue to do business in competition with each other. No doubt the public has reasonable ground to entertain the hope and expectation that its individual members will generally, in their several struggles to acquire the means of comfortable existence, compete with each other. But such expectation is based entirely upon the exercise of the free will and choice of the individual, and not upon any legal or moral duty to compete, and can never, from nature of things, become a matter of right on the part of the public against the individual.' In short, I can see no more reason in law and morals why these two corporations may not consolidate and combine than that two individuals competing for the market may not consolidate their business and form a partnership." ⁷

Where one party has fully performed the contract on his part, and cannot be restored to his former status, nor be honestly dealt with otherwise than by holding the corporation to performance of its share of the bargain, the plea of *ultra vires* is inadmissible.⁸

Thus in a recent case it was held that a corporation is estopped to plead that accommodation notes given by it with the consent of all the stockholders were *ultra vires*, or that a mortgage similarly given to secure such notes was *ultra vires*.⁹

And in a still earlier case the court said: "It is objected, first, that a corporation has no power to form a partnership with an individual to carry on the business, or a part of the business, for the transaction of which the company were incorporated. I do not think that this objection, even if it be well founded, should avail the defendants upon the present motion (to dissolve an injunction). A nice or doubtful question of law should be reversed for final hearing. It is clear that these defendants have, under color of this contract, had the services of the complainant and the use of his patents for the greater part of a year, and they admit that he has received no remuneration whatever. Under such circumstances a court of equity would not suffer the defendants, except in a perfectly clear case, to withdraw the property from the protection of the court upon the allegation that they had no power to make the contract. For the purposes of this motion, it will be assumed, therefore, that the corporation had the legal power to create the partnership." ¹⁰

7—Trimble v. American Sugar Refining Co., 61 N. J. Eq. 340 (1901).

8—Chapman v. Iron Clad Rheostat Co., 62 N. J. L. 497 (1898); citing Camden & Atlantic Railroad Co. v. Mays Landing Railroad Co., 48 N. J. L. 530 (Court of Errors & Appeals, 1886). See also Camden Safe Deposit & Trust Co. v. Citizens Ice & Cold Storage Co., 69 N. J. Eq. 718 (1905); affirmed 71 N. J. Eq. 221 (1907); Rutherford v. Hudson River Traction Co., 73 N. J. L. 227 (1906).

9—Perkins v. Trinity Realty Co., 69 N. J. Eq. 723 (1905); affirmed 71 N. J. Eq. 304 (1906).

10—Van Kuren v. Trenton Locomotive & Machine Manufacturing Co., 13 N. J. Eq. 302 (1861).

This rule does not apply, of course, in cases, where the transaction is contrary to public policy, forbidden by law, or immoral.¹¹

A corporation holds its property as the trustee of its stockholders, and they, like any other cestui que trust, have a right to have the trust property judiciously and honestly managed and preserved from waste and misappropriation. But stockholders, to be entitled to the summary interference of the court in cases where they seek protection against acts which are merely in excess of the power of the corporation, and are not prohibited by law, must be diligent; they must apply so recently after the doing of the act of which they complain that the court may stop or undo the wrong to them without doing equal or greater wrong to some other person. "The cases in which this principle, as it is applied to stockholders, has been discussed, are numerous. The doctrine they establish is, that where an act is done openly, and especially on notice, and without evil intent, though clearly in excess of the power of the corporation, a non-assenting stockholder will not be allowed to pause to speculate upon the chances—to wait until he can see whether such act is likely to result in profit or loss—but to be entitled to the summary interference of the court he must ask for it promptly, and before the act of which he complains has become the foundation of rights or equities which must be destroyed or greatly impaired if the act be nullified or undone. Or, stated with greater brevity, and in its simple essence, the rule is this: If he wants protection against the consequences of an ultra vires act he must ask for it with sufficient promptness to enable the court to do justice to him without doing injustice to others."¹²

But neither the board of directors nor a majority of stockholders can, by ratification, make valid that which the corporation itself is by law prohibited from doing; nor can such ratification be accomplished indirectly under the guise of a refusal to bring an action.¹³

It is well settled that where a corporate excess of power tends to the public injury or to defeat public policy it may be restrained in equity at the suit of the attorney-general. In *Attorney-General v. Delaware & Bound Brook Railroad Co.*, 27 N. J. Eq. 631, 633, in pronouncing the opinion of the court of errors and appeals, Mr. Justice Dixon said: "In equity as in the law court, the attorney-general has the right, in cases where the property of the sovereign or the interests of the public are directly concerned, to institute suit by what may be called civil information for their protection. The state is not left without redress in its own courts, because no private citizen chooses to encounter the difficulty of defending it, but has appointed this high public officer, on whom it has cast the responsibility, and to whom, therefore, it has given the

11—*Camden Safe Deposit & Trust Co. v. Citizens' Ice & Cold Storage Co.*, 69 N. J. Eq. 718 (1905); affirmed 71 N. J. Eq. 221.

12—*Rabe v. Dunlap*, 51 N. J. Eq. 40 (1893).

13—*Siegman v. Electric Vehicle Co.*, 72 N. J. Eq. 403 (Court of Errors & Appeals, 1907).

right of appearing in its behalf and invoking the judgment of the court on such questions of public moment." It appears that the attorney-general has the election in his discretion whether, in cases of excess in corporate powers, he will proceed at law to forfeit the charter and franchises or apply in equity for a restraint of the excess. Both tribunals are open to him. The right of appeal to equity does not depend upon the inadequacy of the legal remedy. There has been some disagreement among the cases as to whether an injunction will issue at the instance of the attorney-general to restrain every excess of corporate power, or whether, before it issues, actual threatened injury must be manifest. The argument which sustains the first class of such cases is that every excess of corporate power violates the contract with government, and thereby invades public and governmental rights. The argument to sustain the other class of cases is that a court of equity should not move upon mere legal intendment, but should be satisfied of a real, substantial public injury which demands the writ of injunction in the due protection of the public. "In the use, at least, of a preliminary injunction, the latter class of cases appears to be the better founded in fitness and reason, for if there be no present emergency to be met, why may not the injunction be reserved until final hearing? But the exhibition of the tendency of the lease in question to public injury does not rest alone upon mere legal intendment, and I may here apply the rule, with the limitation incorporated in it, that the tendency to public injury must in fact appear."¹⁴

The stockholders of a corporation have an indisputable right to have the property of the corporation applied and used exclusively for the purposes specified in its charter, and any attempt by its managers to appropriate it to any other purpose is a usurpation of power and a violation of the rights of the stockholders. No rule of law is better settled than that which declares, that a corporation created by statute, either special or general, can exercise no power and has no rights except such as are granted by express words or fair implication.¹⁵

In *Black v. Delaware & Raritan Canal Co.*, 24 N. J. Eq. 455 (Court of Errors and Appeals, 1873), the Court said:

"There is an implied contract as well between the United Companies and their stockholders as between the companies and the state, that their corporate franchises, powers and property shall not be appropriated to uses or purposes not contemplated or authorized by their charters. As corporations, any action outside of the limits marked out for them in the legislative grant is *ultra vires*. In the language of Master Parker, in 1 Stockton 407, 'The stockholders own the road in common,

14—*Stockton v. Central R. R. Co.*, 50 N. J. Eq. 52 (1892). See also *McCarter v. Vineland Light & Power Co.*, 73 N. J. Eq. 703 (Court of Errors & Appeals, 1908); *McCarter v. Firemans Insurance Co.*, 74 N. J. Eq. 372 (Court of Errors & Appeals, 1909); *McCarter v. Pitman, etc., Gas Co.*, 74 N. J. Eq. 255 (1908).

15—*Rabe v. Dunlap*, 51 N. J. Eq. 40 (1893).

to be employed in specified uses. Each owns a share in the whole, and is to have a proportionate share in its profits. They have invested a portion of their capital in it, and in it alone. They have a right in the road and in every dollar it earns. The directors are their trustees, to employ the joint capital in the management of the road, and the road only, to the end that from the investment the stockholders have chosen they may reap the contemplated profits. And this is the agree- of the stockholders among themselves. They each contract with the other that their money shall be so employed. What the majority determine within the scope of this mutual contract they each agree to abide by, but there their mutual contract ends, and no majority, however large, has a right to divert one cent of the joint capital to any purpose not consistent with and growing out of this original fundamental joint intention."

"This is familiar law, running through all the cases, and cannot be controverted." ¹⁶

"A single stockholder has a right to call a halt. The act or combination of acts is ultra vires, because it is made so by the confessed purpose—the intention and object with which it is to be performed. It is well settled that an act may be intra vires or ultra vires according to the purpose which the directors have in view in doing it. The expenditure of the money of a corporation by its directors is, per se, often a neutral act; whether such expenditure is intra vires or ultra vires must, in large numbers of instances, depend upon the purpose—the actual honest purpose—which the directors have in view." ¹⁷

A bill by a stockholder charging that the corporation is engaged in ultra vires business, should plead the portion of the articles of incorporation specifying the business.¹⁸

It is true that a corporation is a creature of enumerated powers, and that, consequently, its ability to do any particular act must, when the validity of such act is insisted on, be made to appear. But as against a party dealing with a corporation, it is primarily to be assumed that an act done in the prosecution of its business by a corporation is within its competency. Under such circumstances, a *prima facie* case is made in favor of the legality of the corporate act, and if the defendant alleges that the act was ultra vires, the burden of proving it is upon him.¹⁹

All contracts of a corporation which are not contrary to the express provisions of its charter, or the general law, are presumed to be within

16—Black v. Delaware & Raritan Canal Co., 24 N. J. Eq. 455 (Court of Errors & Appeals, 1873).

17—Robotham v. Prudential Insurance Co., 64 N. J. Eq. 673 (1903); Elkins v. Camden, etc., Railroad Co., 36 N. J. Eq. 241 (1882); Ellerman v. Chicago Junction Railroad Co., 49 N. J. Eq. 217 (1891); Wildes v. Rural Homestead Co., 53 N. J. Eq. 425 (1895); affirmed 54 N. J. Eq. 668 (Court of Errors & Appeals, 1896).

18—Trimble v. American Sugar Refining Co., 61 N. J. Eq. 340 (1901).

19—Star Brick Co. v. Ridsdale et al., 36 N. J. L. 229 (1873).

its powers, and the burden is upon those who seek to invalidate them, to show the elements which render them *ultra vires*.²⁰

Corporations in dealing with each other are presumed to contract within the powers and limitations of their charter, and any intention to contract in respect to matters not then authorized, even with the expectation of a subsequent legislative ratification, must be clearly expressed.²¹

Whoever deals with a corporation is in general presumed to know the extent of its powers.²²

79. PARTICULAR POWERS OF CORPORATIONS.

(a) *Power to acquire, hold and alienate property in general.*

The Corporation Act provides (§ 1) that every corporation shall have power to hold, purchase and convey such real and personal estate as the purposes of the corporation shall require, and all other real estate which shall have been bona fide conveyed or mortgaged to the said corporation by way of security, or in satisfaction of debts, or purchased at sales upon judgment or decree obtained for such debts; and to mortgage any such real or personal estate with its franchises; and that the power to hold real and personal estate shall include the power to take the same by devise or bequest.

At common law, every corporation aggregate had power to alien or dispose of its lands, in fee, or to create any lesser estate therein, unless restrained by its charter or by statute.¹

A corporation may hold as tenant from year to year.²

A corporation owning the fee of land can grant to another corporation the right to use the land for a purpose which is not within the powers of the grantor, but is within those of the grantee.³

A deed whereby, for valuable consideration, the land owner granted the right to lay pipes for the transportation of petroleum, together with all the rights necessary to the enjoyment of the grant and the removal of the pipes, does not convey a mere easement in gross nor a license which may be revoked at the will of the grantor, and such grant is not revoked by its assignment to a third person. Under such a grant, the exercise of the right by the laying of a single pipe and later of a second pipe, does not define the extent of the easement so as to prevent the laying of the third pipe. Mere lapse of time does not effect the right of the grantee to lay additional pipes.⁴

A statute enacted in 1899 (P. L. 1899, p. 334) provides that any cor-

20—*Ellerman v. Chicago Junction Railway, etc., Co.*, 49 N. J. Eq. 217 (1891).

21—*Morris & Essex Railroad Co. v. Sussex Railroad Co.*, 20 N. J. Eq. 542 (Court of Errors & Appeals, 1869).

22—*Read v. Atlantic City*, 49 N. J. L. 558 (1887).

1—*Van Houten v. First Reformed Dutch Church*, 17 N. J. Eq. 126 (1864).

2—*Crawford v. Longstreet*, 43 N. J. L. 325 (1881).

3—*Benton v. Elizabeth*, 61 N. J. L. 411 (1898); affirmed 61 N. J. L. 693 (Court of Errors & Appeals, 1898).

4—*Standard Oil Co. v. Buchi*, 72 N. J. Eq. 492 (1907).

poration of this state, except railroad and canal corporations, may hereafter, with the assent of two-thirds in interest of its stockholders, either in person or by proxy, lease its property and franchises to any corporation, and every corporation of this state is hereby authorized to take the lease or any assignment thereof, for such terms and upon such conditions as may be agreed upon, and that any such lease or assignment, or both, heretofore made, are hereby validated; provided, however, that nothing herein contained shall be construed to authorize any corporation which is now specifically prohibited by law or by its certificate of incorporation from leasing its property or franchises to do so, nor to authorize the leasing by any corporation without the consent of the legislature, when such consent is now specially required by an law of this state.

"The suggestion that 'for all substantial and practical purposes a lease for 999 years is a conveyance in fee,' is without force. The question is not as to what may be the practical effect of the particular instrument, but as to its authorization; and, as corporation leases for 999 years are well known when by the statutory provisions to which we have referred, the power to lease was broadly and unqualifiedly given; we are not at liberty to assume that the exercise of that power was intended to be restricted to leases for a term not to exceed some limited, but wholly undefined and indeterminate period."⁵

Whether a corporation may sell and convey its property as an entirety depends upon the purpose for which the sale is made. If made for the purpose of winding up the business of the company and distributing the assets, it may be enjoined at the suit of a stockholder. In such a case proceedings must be taken under the act to dissolve the company. If made merely for the purpose of changing the investment of the capital from one object expressed in the charter to another, such transaction is legal.

Thus in *Sewell v. East Cape May Beach Co.*, 50 N. J. Eq. 717 (1892), where a corporation was threatened with mortgage foreclosure of its entire property, which was depreciating in value, where its debts were large and all attached to such property in its entirety, it was held that the court would not interfere with the directors in disposing of the property as a whole, where there was no fraud and no violation of the company's by-laws, and the directors were sustained by a large majority of the stockholders. "While it may practically result in winding up the present investment of the company, it cannot be said to be a winding up of the corporation, as that term is legally used—the corporation still exists. It may have disposed of all of its real estate, and it may have made provision for the settlement of all its debts, but the money which it is to receive or the security which is to be given still belongs to the corporation and may be used in any future transactions by it."

⁵—*Dickinson v. Consolidated Traction Co.*, 119 Fed. 871 (Circuit Court of Appeals, 3rd Cir., 1903).

In a recent case, an arrangement was made between a New Jersey corporation and a corporation of the state of Washington by which the New Jersey company should transfer all its property and franchises, except the franchise of being a corporation, to the Washington company, and the latter should issue therefor to the New Jersey company twenty thousand shares of fully-paid stock of the par value of \$100 per share, or, in case any stockholder of the New Jersey company refused to accept such stock in exchange for his own stock share for share, then the Washington company should pay \$35 cash in lieu of each share so refused. It was held on bill filed by a stockholder in the New Jersey company, that the consummation of the arrangement ought to be restrained, because (1) it was tantamount to a dissolution of the New Jersey corporation, within the meaning of our statute, and therefore, could be legally carried out only by such proceedings as our statute prescribe for dissolution; (2) under the constitution and judicial decisions in Washington, it is unlawful to issue corporate stock as fully paid, for less than its par value, and the above arrangement shows on its face a purpose to issue stock for thirty-five per cent. of its par value; (3) under the constitution and judicial decisions in Washington, it is unlawful for any corporation to hold stock and exercise the usual rights of stockholders in a corporation of that state.⁶

The court said: "The power of the New Jersey company to carry out this scheme is based by the defendants on the seventh paragraph of its certificate of incorporation, in these words:

"'With the assent in writing and pursuant to a vote of the holders of a majority of the stock issued and outstanding, and not otherwise, the stockholders having been formally convened in meeting, the directors shall have power and authority to sell, assign, transfer, mortgage or otherwise dispose of the whole property of this corporation.'

"This clause does not confer the necessary power. It authorizes the transfer of property only, while the arrangement in question requires the transfer, not merely of all the property, but also of all the franchises of the company, except the franchise of being a corporation. A corporation which has sold only its property, receiving therefor a valuable consideration, is still able to engage in new enterprises within the scope of its charter; but one which has parted with all its franchises except that of existence, is, for all purposes, outside of the winding up of its affairs, defunct. It is in the exact condition contemplated by our statute as that of a dissolved corporation, for the fifty-third section of our Corporation Act provides that 'all corporations, whether they expire by their own limitation or be annulled by the legislature or otherwise dissolved, shall be continued bodies corporate for the purpose of prosecuting and defending suits by or against them, and of enabling them to settle and close their affairs, to dispose of and convey their property, and to divide their capital, but not for the purpose of continuing the business for which they were established.

6—*Coler v. Tacoma Ry. & Power Co.*, 65 N. J. Eq. 347 (Court of Errors & Appeals, 1903).

"That such dissolution was regarded as the practical effect of the present arrangement, and so intended by the directors and stockholders who favored it, is made evident by the fact that, at the same meetings at which the arrangement was approved, they voted for a formal dissolution of the company under the statute. The mode in which a New Jersey corporation can voluntarily effect its own dissolution is prescribed by section 31 of our act, and, of course, no other mode can legally be adopted. It is conceded that this mode was not pursued, and it seems, necessarily, to follow that the plan which involves dissolution is not yet capable of lawful consummation." 7

(b) Power to acquire and hold the corporation's own shares.

In *Chapman v. Ironclad Rheostat Co.*, 62 N. J. Law, 497 (1898), Mr. Justice Dixon, in an opinion delivered in the Supreme Court, very clearly demonstrates that, under the Corporation act of 1896, there is an implied grant of power to corporations to purchase shares of their own capital stock whenever such purchase is required for legitimate corporate purposes. Section 20 makes such shares personal property; section 1, subdivision 4, gives power to purchase such personal property as the purposes of the corporation shall require, except what is excepted in section 3, which exception does not include shares of its own stock. Therefore, in connection with sections 29 and 38, the right of a corporation to purchase its own shares is necessarily implied. This right is, also, so fully recognized by the twenty-ninth section, that it seems to be removed from debatable questions. That section provides that capital stock may be decreased by retiring shares owned by the corporation, which unquestionably implies the power to acquire and hold its own shares. * * * The company may purchase in open market or of shareholders and hold its stock; but, if the purpose is to retire the stock, the provisions of the 27th and 29th sections must be complied with, one of which is that the purchase must be for a price not above par.⁸

Where under an agreement of employment made by a corporation it was provided that the employee should purchase and hold during his employment certain shares of stock in the corporation, and that if the corporation should discharge the employee during his employment it would purchase the stock from the plaintiff at par, it was held that the fact that the corporation exerted the power in order to secure the services of the plaintiff is *prima facie* sufficient indication that the purposes of the corporation required it.⁹

"I do not suppose that this decision goes the length of authorizing a corporation to purchase and pay for its own stock if such purchase and payment will disable it from paying its debts in full, or of author-

7—*Coler v. Tacoma Ry. & Power Co.*, 65 N. J. Eq. 347 (Court of Errors & Appeals, 1903).

8—*Berger v. U. S. Steel Corporation*, 62 N. J. Eq. 809 (Court of Errors & Appeals, 1902).

9—*Chapman v. Iron Clad Rheostat Co.*, 62 N. J. L. 497 (1898).

izing a corporation to contract with one or more of its shareholders to buy shares and so convert them into creditors entitled to come in on an equality with other creditors, if the assets be at the time insufficient to pay all the creditors in full. But the evidence does not bring the case in hand under either of these categories, and so nothing is decided in reference to them."¹⁰

A solvent corporation may purchase its own stock and pay therefor with its bonds. Where such bonds are payable to bearer, the corporation is estopped to deny their validity as against innocent purchasers for value.¹¹

In the case of *Knickerbocker Importation Co. v. Board of Assessors*,¹² it is stated in the opinion of the court by Judge Dill that a corporation has no power to take a donation of stock for the purpose of creating so-called treasury stock.

(c) *Power to acquire and hold shares of stock and securities of other corporation.*

Any corporation may purchase, hold, sell, assign, transfer, mortgage, pledge or otherwise dispose of the shares of capital stock of, or any bonds, securities or evidences of indebtedness created by any other corporation or corporations of this or any other state, and while owner of such stock may exercise all the rights, powers and privileges of ownership, including the right to vote thereon.¹³

The Corporation Act (§ 50) provides that corporations having for their object the building, constructing or repairing of railroads, water gas or electric works, tunnels, bridges, viaducts, canals, hotels, wharves, piers or any like works of internal improvement or public use or utility, may subscribe for, take, pay for, hold, use and dispose of stock or bonds in any corporations formed for the purpose of constructing, maintaining and operating any such public works.

The statutory power to purchase, hold, etc., stock and bonds of other corporations is subject, however, to the limitations imposed by section 2 of the same Act; that is to say, the power exists as a primary power only when the purpose to exercise it as such is expressed in the certificate of incorporation, and otherwise it exists as an incidental power only so far as necessary or convenient to the attainment of the objects that are set forth in the charter or certificate of incorporation.¹⁴

In *Dittman v. Distilling Co. of American*, 64 N. J. Eq. 537 (1903), it was held that where a corporation was authorized to manufacture and sell whiskey and spirits, either at wholesale or retail, and to purchase the stocks of other corporations for such purpose, it had power to or-

10—*Oliver v. Rahway Ice Co.*, 64 N. J. Eq. 596 (1903).

11—*Hoskins v. Seaside Ice Mfg., etc., Co.*, 68 N. J. Eq. 476 (1905).

12—74 N. J. L. 583 (Court of Errors & Appeals, 1907).

13—Corporation Act, § 13.

14—*State v. Atlantic City & S. R. Co.*, 72 Atl. 111 (Court of Errors & Appeals, 1909).

ganize and hold the stocks of corporations in other states through which it sold its manufactured product. Vice-Chancellor Emery said:

"As to companies in which New Jersey companies may hold stock and the states in which subsidiary companies may be organized, it may be that the late decision of the court of errors and appeals, in *Coler v. Tacoma Railway Co.*, limits the power of New Jersey companies to hold stock of corporations of other states to the stock in companies organized in states whose laws authorize their own domestic corporations to hold stock in and control their own domestic companies. In the *Coler* case the court of errors and appeals, on the application of the stockholder of a New Jersey company, which owned a railroad in the State of Washington, enjoined the sale of the railroad to a Washington company, in consideration of stock of the Washington company, one ground being that, under the statutes of Washington and the decisions of the Washington courts, a Washington corporation had no power to purchase or hold the stock of a Washington company, and that it must therefore be concluded by the courts of this state that the ownership of the stock of a Washington corporation by a foreign corporation was against the public policy of Washington, and this holding and control being thus against the public policy of the state of Washington, it should be enjoined in New Jersey. In the present case there is no proof as to the statutes or decisions of the state of West Virginia upon the question of the right of a West Virginia corporation or of a foreign corporation to hold stock in a West Virginia corporation, and it must, in the absence of such proof, be assumed, under the laws of evidence as well as of comity, that the laws of West Virginia are similar to our own laws, and authorize the Kentucky company, formed under our laws, to exercise within the limits of West Virginia the powers conferred upon it under our statutes and its charter. The law of comity, settled in American jurisprudence by the decisions to which I referred at some length in my opinion in *Coler v. Tacoma Railway Co.*, 19 Dick. Ch. Rep., 117, is that a corporation of one state of the Union may exercise within another state all the powers of its charter to the extent that its exercise thereof has not been prohibited in such other state or affirmatively declared by the constitution, statutes or decisions of such other state to violate its own public policy. Such violation of the declared public policy of a foreign state must be proved and cannot be assumed."¹⁵

In a recent case Vice-Chancellor Stevenson stated the history and development of this power as follows:

"Section 51 may have been declaratory and its sole effect may have been to remove certain, perhaps vague, doubts as to the inherent capacity or incapacity of corporations to acquire and hold shares of stock of other corporations, even when such acquisition is made strictly in pursuance of the corporate objects.

"Formerly corporations were incapable of voting upon stock of other

15—*Dittman v. Distilling Co. of America*, 64 N. J. Eq. 537 (1903).

corporations until proxies were provided for by statute. Corporations are now incapable of acting as directors of other corporations. But the power of a corporation at common law to acquire and hold stock in other corporations as property has been involved in doubt largely, I think, by the confusion so often made of an *ultra vires* act with an illegal act. (*Bissell v. M. S., etc. R. R. Co.*, 22 N. Y. 258, 269; 2 Cook Corp. Sec. 667n; *Bath Gas Light Co. v. Claffy*, 151 N. Y. 24, 35).

"In former times, when the powers of corporations were defined in special charters or in narrow statutes which permitted the formation of corporations only for a few specified objects, the voluntary expenditure of corporate funds for the purchase of shares of stock of another corporation would almost inevitably be a division of the corporate capital, and hence *ultra vires*. But when, in the honest pursuit of the corporate objects, the protection of the capital of the corporation, stock was taken for a debt, either directly from an insolvent debtor or by a judicial sale, no question was raised as to the capacity of the corporation either to acquire or hold such stock. There were no mortmain provisions of the common law applicable to corporate stock.

"When corporations under broad charters, had power to invest their funds as the directors might see fit, there was no legal prohibition upon investments in stock of other corporations. As soon as our General Corporation act was amended so as to permit the organization of corporations under it for 'any lawful business whatever' (P. L. of 1865, p. 913; Gen. Corp. Act of 1875, sec. 10), it seems plain that corporations could be created for the express purpose of acquiring, holding and dealing in stocks to the extent that such business may be lawful. To construe the word 'lawful' in such a statute as this in the sense of 'authorized'—i. e., not *ultra vires*—in accordance with a dictum in the case of *People v. Chicago Gas Trust Co.*, 130 Ill. 268, 811, converts the statutory definition of the lawful objects of corporations into a meaningless circle. In my opinion it is the very great enlargement of the scope of corporate objects, the wide extension of the purposes for which they may be formed, under our General Corporation act, and not the enabling act now embodied in section 51, which has extended the power of corporations created under our general act to acquire and hold stocks of other corporations.

"I may be observed that the important word used in section 51 is not 'acquire,' but 'purchase.' If, therefore, this word 'purchase' is to be construed in section 51 of the Corporation act as I have already construed it in section 16 of the General Insurance act, then it follows that even if section 51 were applicable to the investment of the funds of the Prudential Insurance Company in the stocks of private corporations, still that section would give no power to the Prudential company to subscribe for this new issue of Fidelity stock.

"That section 51 had an important effect as an enabling and declaratory statute without making it operative as a practical repealer of important sections of large numbers of charters of banks and insurance

companies, and also of important sections of our general laws in relation to banking and insurance, and without making it operative to extend the objects and powers of corporations under their charters or certificates, will appear, I think, from an examination of the authorities in relation to the common law power of corporations to acquire shares of the capital stock of other corporations.

"There is authority for the proposition that corporations are under no disability at common law to purchase and hold the stock of other corporations. (*In re Barned's Banking Co.*, L. R. 3 Ch. App. 105, 113; *Royal Bank of India's Case*, L. R. 4 Ch. App. 252, 257; *Booth v. Robinson*, 55 Md. 419; *Davis v. Electric Co.*, 77 Md. 35.)

"There is also authority for the proposition that corporations cannot acquire and hold the stock of other corporations without express authorization under a statute, the origin of the prohibition, whether in the doctrine of ultra vires or in some positive rule of law based on public policy, being often left in uncertainty. (See *Noyes InterCorp. Rel. Secs.* 264, 265; 1 *Cook Corp. Sec.* 315; 1 *Thomp. Corp. Sec.* 1102; 7 *Thomp. Corp. Secs.* 8353, 8354; 7 *Am. & Eng. Encycl. L.* 810, 816, and cases cited.)

"There are also dicta at least sustaining the proposition that corporations are prohibited by a general rule of positive law based on public policy, entirely distinct from the doctrine of ultra vires, from purchasing stock in other corporations. (*Oelbermann v. New York & Northern Railroad Co.*, 77 Hun, 332, 335; *Franklyn Bank v. Com. Bank*, 36 Ohio, 350; *Franklyn Co. v. Lewiston Savings Bank*, 68 Me. 43, 56.)

"There is also authority for the proposition that a rule of law based on public policy, or on the doctrine of ultra vires, or on both, prohibits a corporation from acquiring the stock of another corporation where the business of one or both corporations has certain characteristics or where the purchase is made for certain purposes. (1 *Cook Corp. sec.* 315; *Louisville, etc., Railroad Co. v. Kentucky*, 161 U. S. 677, 698; *People v. Chicago Gas Trust Co.*, 130 Ill. 268.)

"In this state of the authorities there was a wide and useful scope for the operation of section 51 and the prior laws which it displaced without construing those laws as arbitrarily extending, or endeavoring to extend, the objects and powers of corporations organized under special charters or under the General Corporation act itself.

"The legislation of New Jersey, which culminated in the enactment of sections 2 and 51 of the General Corporation act of 1896, certainly swept away all doubts about the capacity of corporations under any general rule of law recognized in the state to purchase and hold shares of stock of other corporations, and established the rule that all corporations may freely purchase and hold such shares so far as is 'necessary and convenient to the attainment' of their corporate objects. But corporations can be formed under the act only for 'lawful purposes,' and, whatever may be inserted in their certificates, can be al-

lowed to accomplish only lawful purposes. The question, therefore, remains whether, notwithstanding the capacity of corporations generally to hold stock of other corporations, there still remain prohibitions upon such corporate holding of stock applicable to particular cases in which the lawfulness of such holding by a natural person would be conceded. However this may be—whatever may be the precise effect of section 51 upon corporations formed before or after its enactment, under the general law of which it is a part—it is sufficient for all present purposes to reach the conclusion that this section has no effect upon the law which for years has been maintained for the special regulations of the investment of the funds of insurance companies, and which, six years after section 51 was passed, the legislature revised and reenacted as a part of our insurance code.”¹⁶

(d) *Power to contract in general.*

A corporation, when acting within the scope of its powers, stands, in respect to its ability to contract, substantially upon the same footing as do natural persons. Contracts made on its behalf by authorized agents, though by parol, are *express* contracts, and, as in the case of individuals, the law will on ordinary grounds imply promises against it.¹⁷

Thus it was held that an alleged contract between two municipal corporations for a water supply was a contract for the sale of goods, wares and merchandise and thus within the statute of frauds.¹⁸

A trading or manufacturing corporation, until its charter is annulled by a proceeding at law, has the same authority as an individual trader or manufacturer to sell or consign its goods to select its selling agents and to impose conditions as to whom they shall sell and the terms upon which they shall sell.¹⁹

Contracts for the compromise of suits and for non-competition are within the exercise of powers incident to corporate management and business. Contracts which impose unreasonable restraint upon the exercise of a business, trade or profession are void, but contracts in reasonable restraint thereof are valid. The test to be applied in determining whether a restraint is reasonable or not, is to consider whether the restraint is only such as is necessary to afford a fair protection to the interests of the party in whose favor it is given, and not so large as to interfere with the interest of the public. A covenant by parties selling the plant and business of stock yards not to engage in the business for a certain number of years, nor in the place where they are

16—*Robotham v. Prudential Insurance Co.*, 64 N. J. Eq. 673 (1903).

17—*Crawford v. Longstreet*, 43 N. J. L. 325 (1881).

18—*Mayor, etc., of J. C. v. Town of Harrison*, 71 N. J. L. 69 (1904).

19—*Attorney-General v. American Tobacco Co.*, 55 N. J. Eq. 352 (1897); affirmed 56 N. J. Eq. 847 (Court of Errors & Appeals, 1898).

located, or within two hundred miles thereof, is not unreasonable and not an illegal restraint of trade.²⁰

"The rule of this state is that a contract in restraint of trade, will not be enforced unless the restraint is no more extensive than is reasonably required to protect the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public. *Mandeville v. Harman*, 42 N. J. Eq. 185; *Sternberg v. O'Brien*, 48 N. J. Eq. 370, both of which were cited with approval by this court in *Trenton Potteries Co. v. Oliphant*, 58 N. J. Eq. 507. Where the contract relates to personal services of a special, unique or extraordinary character which can be performed by no one else, and there is a negative covenant, the court sometimes enforces the negative covenant by injunction, as in *Lumley v. Wagner*, 1 DeG. M. & G. 604. But the jurisdiction of equity rests upon the inadequacy of the legal remedy (*Pom. Eq. Jur. sec. 1344*), and the courts of other jurisdictions, as well as our own courts in the cases cited, have shown a reluctance to extend the jurisdiction."²¹

(e) Power to borrow money and to secure the payment thereof; accommodation paper.

Every corporation created for transacting business, unless restrained by its charter or some statute, has, as a necessary incident, the power of incurring debts in the course of its legitimate business and of making and endorsing negotiable paper in payment of such debts.²²

Thus it was held that the act of March 27, 1878 (*Gen. Stat.*, p. 1613, § 33), providing that whenever it may be necessary for any gas light company to increase its bonded indebtedness, it may, by majority vote of its board of directors, with the consent of the majority of the stockholders holding sixty per cent of the capital stock, increase the bonded indebtedness to an amount not exceeding two-thirds of the amount of the capital stock, merely conferred additional powers on such corporations as were previously restricted by their charters in the power to issue bonds, to issue bonds to the amount fixed by the act, and that it did not restrict the privileges of those that already possessed power to create bonded indebtedness to a greater amount than that named in the act.²³

A bona fide holder of corporate paper has a right to presume that it was issued under the circumstances which give the requisite authority,

20—*Ellerman v. Chicago Junction Railways, etc., Co.*, 49 N. J. Eq. 217 (1891).

21—*Taylor Iron & Steel Co. v. Nichols*, 73 N. J. Eq. 684 (*Court of Errors & Appeals*, 1908).

22—*Fifth Ward Savings Bank v. First National Bank*, 48 N. J. L. 513 (*Court of Errors & Appeals*, 1886); *Lucas v. Pitney*, 27 N. J. L. 221 (1858); *National Bank of Republic v. Young, Receiver*, 41 N. J. Eq. 531 (*Court of Errors & Appeals*, 1886); *Stratton v. Allen*, 16 N. J. Eq. 229 (1863); *Thatcher v. Consumers Gas & Fuel Co.*, 72 N. J. Eq. 825 (1907).

23—*Thatcher v. Consumers Gas & Fuel Co.*, 72 N. J. Eq. 825 (1907).

and such paper is no more liable to be impeached for any infirmity in the hands of such a holder than any other commercial paper.²⁴

The right to create a debt also carries with it the right to secure it, by mortgage or otherwise, in the absence of any statutory restraint upon the corporation.²⁵

A statute enacted in 1902 authorizes the conversion of preferred stock into bonds under certain conditions, as follows:

With the consent of two-thirds in interest of each class of the stockholders present in person or by proxy at a meeting called in the manner provided in § 27 [of the Corporation act], every corporation organized under this act that shall have issued preferred stock, entitling the holders thereof to receive dividends at a rate exceeding five per centum per annum, and that shall have continuously declared and paid dividends at such rate, on such preferred stock for the period of at least one year next preceding the meeting, and whose floating or unfunded debt at the time of the stockholders' meeting shall, in the certificate thereof filed with the secretary of state, be certified not to exceed ten per centum of the par amount of the preferred stock then outstanding, and whose assets at such time, after deducting the amount of its indebtedness, shall be certified in the judgment of the officers making such certificate to be at least equal to the amount of preferred stock issued and outstanding, may, with the consent of the holder of any such preferred stock, redeem and retire the preferred stock of such holder, out of bonds or out of the proceeds of bonds of the corporation, bearing interest at a rate not exceeding five per centum per annum, the principal of such bonds being made payable at a date not less than ten years from the date thereof; every corporation organized under this act may, from time to time, in the manner above provided, issue bonds, which, if therein so declared, shall be convertible at par at the option of the holder, into fully paid common stock of the corporation at par, within any period therein prescribed not less than two years from the issue thereof; and in such case the board of directors may authorize the issue of the common stock into which such bonds, by their terms, shall be convertible.²⁶

A corporation has no authority to give accommodation paper, but it is bound by paper given for accommodation only, when in the hands of a bona fide holder. The court said: "If the paper was accommodation paper and so known to be by the banks receiving it, then the authority to bind the corporation does not exist, for, as is well settled, the cor-

24—*National Bank of Republic v. Young*, 41 N. J. Eq. 531 (Court of Errors & Appeals, 1886).

25—*Berger v. U. S. Steel Corporation*, 63 N. J. Eq. 809 (Court of Errors & Appeals, 1902); *Brown v. Citizens' Ice & Cold Storage Co.*, 72 N. J. Eq. 437 (Court of Errors & Appeals, 1907); *Magie v. Evangelical Dutch Church*, 13 N. J. Eq. 77 (1860); affirmed 15 N. J. Eq. 500 (Court of Errors & Appeals, 1863).

26—P. L. 1902, p. 217. See *Berger v. U. S. Steel Corporation*, 63 N. J. Eq. 809 (Court of Errors & Appeals, 1902); *Hodge v. U. S. Steel Corporation*, 64 N. J. Eq. 807 (Court of Errors & Appeals, 1903).

poration has no authority to give accommodation paper. *National Bank of the Republic v. Young, Receiver*, 14 Stew. Eq. 531, 538 (Court of Errors and Appeals, 1896). But in reference to the liability of a trading or business corporation, such as the manufacturing company, on accommodation paper, the rule, as settled by this case (at p. 538), is that the title of the holder for value before maturity, can only be defeated by proof of such circumstances as show that he took the paper with knowledge of some infirmity on it, or with such suspicion with regard to its validity as that his conduct in taking it was fraudulent."²⁷

A corporation having the power to enter into contracts in the course of its ordinary and proper business, it follows that it has the right to enforce and carry such contracts into effect, by their voluntary receipt of payment, and by consequence to take such security for the payment as they may deem expedient, whether by original bond or note, of their debtors, or by the transfer or delivery of the bond or note of a third person, unless specially restrained by the terms of its charter, from doing so.²⁸

(f) *Power to guarantee contracts and obligations.*

A corporation having power to take and dispose of the securities of another corporation may guarantee their payment if it disposes of them to another party in payment of its own debt; if it buys property subject to a mortgage securing bonds, it may guarantee the payment thereof if said guarantee is taken as payment pro tanto of this debt; the two transactions are the same in result, and mere routine of action cannot affect validity.²⁹

A trading corporation owning most of the stock of a manufacturing corporation, was the agent for the sale of all the product manufactured, and received the entire proceeds of sales. It supplied the manufacturing corporation with running expenses, and to such end turned over commercial paper, which the manufacturing corporation endorsed and discounted at banks, using a large amount of the cash thus obtained in meeting pay-rolls, and some of it going to the credit of the trading company. It was held that in view of the relations of the corporations, the paper whose discount went to the credit of the trading company was not accommodation paper.³⁰

"The right of a manufacturing company to loan its credit for the express purpose of fostering its legitimate business, is sustained in *Holmes v. Willard*, 125 N. Y. 75, 81, by Judge Earl, as follows: 'A corporation dealing in manufactured goods, and needing them for sale, may, as a proper incident to its business, extend financial aid to a

27—*Blake v. Domestic Mfg. Co.*, 64 N. J. Eq. 480 (1897); see also *Perkins v. Trinity Realty Co.*, 69 N. J. Eq. 723 (1905); affirmed 71 N. J. Eq. 304 (Court of Errors & Appeals, 1906).

28—*Bennington Iron Co. v. Rutherford*, 18 N. J. L. 467 (1842).

29—*Ellerman v. Chicago Junction Railways, etc., Co.*, 49 N. J. Eq. 217 (1891).

30—*Blake v. Domestic Mfg. Co.*, 64 N. J. Eq. 480 (1897).

manufacturer by advancing him money to enable him to furnish the goods. This aid may be extended by a loan of its own money, or it may take his notes, and by its credit raise money thereon and advance such money, looking for reimbursement out of goods to be manufactured and delivered to it.' The rule thus laid down is properly applicable to this case, for here the defendant loaned its credit to a manufacturer in order to enable it to procure goods to be manufactured for the defendant's account, and the loan of its credit can be as well justified as the loan of its money when used to advance its legitimate business." 31

·(g) Power to transact business without the state.

The Corporation act provides (§ 7, as amended by P. L. 1905, p. 515) that any corporation of this state, heretofore or hereafter organized under the laws of this state, may conduct business, have one more offices, and hold, purchase, mortgage and convey real and personal property outside of this state in any of the several states, territories, possessions and dependencies of the United States, the District of Columbia, and in foreign countries; provided, such powers are included within the objects set forth in its certificate of incorporation or charter.

80. CORPORATE BONDS AND SECURITIES.

In *Benwell v. Newark*, 55 N. J. Eq. 260 (1897), Vice-Chancellor Pitney classified and defined corporate bonds as follows:

"Registered bonds."—A registered bond is one which is a simple certificate of indebtedness, in favor of a particular individual, payable at a day named, with interest at days named. The name of the payee is entered on the books of the corporation debtor—municipal or private—as the registered owner, or, if it be a government bond, on the register of the government. On the days when, by the terms of the bond or certificate of indebtedness, the interest falls due, it is paid directly to the registered creditor, without presentation of the bond, usually by check drawn to his order and sent by mail, or, if he so demands, by cash in hand, but by long-settled course of practice the payment is made by check to the order of the creditor. These bonds or certificates of indebtedness are not negotiable, and can be transferred only by an entry on the books of the debtor corporation, with a proper endorsement on the bond itself, or by the issue of a new certificate if it be a government indebtedness. The peculiar value of this class of securities lies in the fact that it is not necessary to produce them to the debtor at each time that the interest is due, and the danger of loss by robbery or fire is entirely removed. As they are usually made to run for a long term of years, so that, as in the present instance, the amount of interest in the aggregate is really greater than the principal, this peculiarity is of great importance.

31—*Whitehead v. American Lamp & Brass Co.*, 70 N. J. Eq. 581 (1905). See also *Earl v. American Sugar Refining Co.*, 74 N. J. Eq. 751 (1908).

"Coupon bonds."—These are made payable to bearer and are provided with interest warrants called coupons, for each installment of interest, also payable to bearer, which, when actually detached, are negotiable and payable to bearer. The result is that a security of this class is passed easily from hand to hand—is convenient for use among bankers and moneyed institutions that desire a security which is easily, readily and quickly convertible into money by sale, the title to which may be passed from hand to hand without any formality except the mere tradition of the paper. This ease of transfer gives this class of securities its peculiar value. The collection of the interest is made by simply detaching the coupon and presenting it at the place of payment, either directly or through the usual course of bank exchanges, where it is paid without inquiry as to the ownership of the bond from which it has been cut. The disadvantage of this sort of security is the danger of its loss by theft or fire.

These distinguishing characteristics make the registered bond more valuable to persons who desire a permanent investment and wish to eliminate the danger of loss by robbery or fire, such as large savings institutions and the like, while, as before observed, coupon bonds are more valuable for such as desire something easily negotiable from day to day.

"Convertible coupon bonds."—A third class of bonds has its origin as follows: Parties desiring to borrow large sums of money naturally attempt to put their securities in such shape as to attract all classes of investors, and to that end have devised a third class of bonds, known as "convertible coupon bonds"—that is, coupon bonds which may, at the option of the holder, be converted into registered bonds. And this option is expressed in a clause contained in the bond itself, and when inserted produces a convertible coupon bond. The usual process of converting a coupon to a registered bond is to present the bond, cut off and surrender the coupons to the debtor, have the name of the creditor entered on a proper book kept by the debtor and a proper endorsement made upon the bond itself, showing its registration, thus reducing it, as nearly as possible, to the form and shape of an original registered bond.

"Registered coupon bonds."—Ordinarily, as everybody knows, a bond which has once been converted from a coupon bond into a registered bond, cannot be reconverted into a coupon bond without the issuance of a new bond. This results from the fact that the ordinary registered bond does not include coupons for the payment of interest, and to convert a registered bond into coupon bond would require the issuing of a set of coupons for each bond. The desire, however, to have a bond which may be converted and reconverted at the pleasure of the holder, has given rise to a half-way process, producing a mongrel bond (a fourth class), known as a "registered coupon bond," which is registered as to the principal or body of the bond, but not as to the interest. The coupons remain negotiable and are collected precisely

as if the principal had never been registered. They are payable to whoever presents them for payment, and no questions are asked as to whether the person presenting them is the registered owner and holder of the bond itself or not. The advantage of this fourth class is that, after having once been registered, the bonds may be reconverted into pure coupon bonds by an assignment on the back payable to bearer, and having them so marked on the register of the debtor. It will be observed that it is necessary to keep the coupons alive in order to give them this capacity of being reconverted into coupon bonds. Such bonds have been issued, in a few instances, by railroads, but very rarely, so far as the evidence shows, by municipalities, and never by either the general government or any state government. It is to be observed that this matter of conversion and reconversion is always, so far as appears, made optional with the holder.

It has been held that trading stamps are choses in action, practically negotiable orders for merchandise, transferable by all the means by which such property may be transferred. When they are issued without limitation on the power of the holders, who have acquired them as premiums from merchants with cash purchases, to transfer them, the company issuing them has no power, by a subsequent change of its plans and contracts with its customers, to limit the transferable quality of those previously issued, which have passed to dealers and traders in the regular way.¹

A company giving a written certificate that a person named is entitled to a bond about to be issued by such company, is estopped from denying the truth of such statement in favor of a person who, in good faith, has changed his position in reliance on such certificate. So far as such parties are concerned, it does not matter whether the certificate so given be negotiable or not.²

The doctrine which validates securities of a corporation within its apparent powers, but improperly, and therefore illegally, issued for the want of acts to be done by the corporation or its officers in the management of its internal affairs, applies only in favor of bona fide holders for value. A person who takes such a security with knowledge that the conditions on which alone the security was authorized were not fulfilled, is not protected, and in his hands the security is invalid, though the imperfection is in some manner relating to the internal affairs of the corporation, which would be unavailable against a bona fide holder of the same security.³

The holder of coupon bonds, containing a provision which entitles him to have them converted at his option, into registered bonds, may enforce such contract by an action for specific performance; the duty

1—*Sperry & Hutchinson Co. v. Hertzberg*, 69 N. J. Eq. 264 (1905).

2—*Midland Railroad Co. v. Hitchcock*, 37 N. J. Eq. 549 (Court of Errors & Appeals, 1883).

3—*Hackensack Water Co. v. DeKay*, 36 N. J. Eq. 548 (Court of Errors & Appeals, 1883).

to register the bonds being purely contractual, and not enforceable by mandamus, and the remedy by an action for damages being inadequate.⁴

Where third parties advance money to a corporation to pay interest coupons, which, by the terms of the mortgage securing the coupons and bonds to which they are attached, have preference over the bonds, and receive the coupons in return for their advances in the belief that they succeed to the rights of the bondholders in the coupons by purchase, the bondholders may, nevertheless, insist on their mortgage lien free from the purchased coupons, unless they understood or had reason to inquire, that the third parties were buying the coupons instead of the corporation paying them.⁵

Corporate bonds are negotiable instruments within the provisions of the Negotiable Instruments Act (P. L. 1902, p. 583), and the rights and liabilities of the makers and holders are determined by its provisions. Thus it was held by the Court of Errors in *Montvale v. Peoples' Bank*, 74 N. J. L. 464 (1907), that it is no defence to an action when a municipal bond (made and executed after the act of 1902 took effect) in the hands of holder "in due course," that the maker of the bond never in fact delivered it.

Long before the enactment of the negotiable instruments law, however, it was held, coupon bonds payable to bearer, although not negotiable under the law merchant, as bills and notes, are instruments of a peculiar character, and being expressly designed to be passed from hand to hand, and by common usage actually so transferred, are capable of passing by delivery so as to confer a complete title in the possessor.⁶

"It rests upon the faith that such bonds are expressly designed to be thus circulated, and to be sold in the stock market like public securities, that they are universally so used."⁷

"Commercial securities of this character are an exception to the rule that one cannot give a better title to personal property than he has himself; and as between the holder of such securities, who has taken them before maturity for value, and the real owner from whom they were obtained by fraud or felony, the title of the former will prevail unless he took his title *mala fide*."⁸

If bonds contain words of negotiability, they are negotiable in the same way as promissory notes. If payable to bearer, they are negotiable by delivery. The title of the purchaser of such a security for a valuable consideration, has all the qualities of the title of the holder of ordinary commercial paper under the same circumstances. It will

4—*Benwell v. Newark*, 55 N. J. Eq. 260 (1897).

5—*Morton Trust Co. v. Home Telephone Co.*, 66 N. J. Eq. 106 (1904).

6—*Morris Canal & Banking Co. v. Fisher*, 9 N. J. Eq. 667 (Court of Errors & Appeals, 1855).

7—*Morris Canal & Banking Co. v. Lewis*, 12 N. J. Eq. 323 (Court of Errors & Appeals, 1858).

8—*Fifth Ward Savings Bank v. First National Bank*, 48 N. J. L. 513 (Court of Errors & Appeals, 1886).

not be defeated by the want of title of the vendor from whom he purchases, unless actual fraud be shown in the party making the purchase. Such bond issued and put in the market, with a blank for the name of the payee, has the same quality of negotiability as a bond complete when issued. The authority for a subsequent bona fide holder writing his own name in the blank space, and making the instrument complete, is implied from the act of the obligors in putting it in circulation in that condition.⁹

"In this state, coupon bonds of a corporation, issued under special legislative authority, and designed for the purpose of raising money on a credit, if they contain words of negotiability, are negotiable instruments the same as ordinary commercial paper; and the same immunity from defenses in the hands of bona fide holders applies to mortgages securing such bonds as to the bonds themselves. Persons taking securities of this character are chargeable with knowledge of the power to make them as conferred by the charter. If the power granted by the charter is subject to a condition relating either to the form in which the security shall be made in order to be valid, or to some preliminary proceeding extraneous to the acts of the corporation or its officers, securities issued not in the prescribed form, or without the preliminary proceedings had, are subject to defences in consequence thereof, even in the hands of bona fide holders. Thus, where the statute requires such bonds to be certified across the face and to be registered and declares that no bonds shall be valid unless so registered, bonds issued without such registry and certificate were held to be void. * * * But this doctrine does not prevail in those instances in which the right to issue such securities is by the charter conditioned upon the performance of acts by the corporation or its officers, relating to the management of the affairs of the company. In such cases, as was said by Vice-Chancellor Wood, "if the party contracting with the directors find the acts to be within the scope of their power, under the deed of settlement, he has a right to assume that all such conditions have been complied with.""¹⁰

"In the courts of this country it may also be considered as settled law that, except where the statute empowering a corporation to make securities designed to be negotiable, prescribes as a condition that they shall be issued with certain formalities to be observed, as in *Morrison v. Township of Bernards*, 36 N. J. L. 219, or prescribes as a condition to the power the approval of the voters at an election, as in *Hudson v. The Inhabitants of Winslow* (events external to the business of the corporation, the concurrence of which may be easily ascertained), where the corporation has power, under any circumstances,

9—*Boyd v. Kennedy*, 38 N. J. L. 146 (1875); *Morris Canal & Banking Co. v. Fisher*, 9 N. J. Eq. 667 (Court of Errors & Appeals, 1855); *Morris Canal & Banking Co. v. Lewis*, 12 N. J. L. 323 (Court of Errors & Appeals, 1858).

10—*Hackensack Water Co. v. DeKay*, 36 N. J. Eq. 548 (Court of Errors & Appeals, 1883).

to issue negotiable securities, a bona fide holder has a right to presume that they were issued under the circumstances which give the requisite authority; and they are no more liable to be impeached for any infirmity in the hands of such a holder than any other commercial paper."¹¹

The title of bona fide holders of coupon mortgage bonds issued by a corporation and payable to bearer, which are taken before maturity, is like the title to commercial paper so taken, good against all secret equities claimed by the corporation or third party, and a bona fide pledgee has the same rights as a bona fide purchaser to the extent of his interest in the pledge.¹²

Where a corporation had power to purchase its own stock and to pay therefor with its bonds, and bonds payable to bearer were so issued, it was held that the corporation was estopped to deny their validity as against innocent purchasers for value.¹³

In *City of Elizabeth v. Force*, 29 N. J. Eq. 587 (Court of Errors and Appeals, 1878), it was held, that where a negotiable city bond was stolen, and its number altered by the thief, it was good in the hands of a subsequent bona fide holder, who took it for value.

While negotiations were pending between two gas companies for their consolidation upon a certain basis of indebtedness, one of the companies passed a resolution, without the knowledge of the other, declaring a scrip dividend of ten per cent on the amount of its capital stock, with interest, payable at the option of the company, thus increasing their indebtedness to that amount. Certificates of indebtedness were issued in accordance with the resolution. Consolidation was effected between the companies without any knowledge of the other company as to such resolution and such increased indebtedness. Upon bill filed for that purpose, the script was declared void, and the company issuing it was restrained from recognizing the script as a valid obligation, and from permitting its transfer. "The only question is, whether Mr. Smith, a bona fide purchaser of the scrip for value without actual notice, will be protected in his purchase. That the company had no lawful authority for issuing the certificates, cannot be doubted. Had a purchaser of any of these certificates made inquiries as to their origin, he would have discovered that they had been issued contrary to law. Nor would he have found anything in the situation of the affairs of the company to have warranted the board in issuing them. The rule which is applied to negotiable commercial paper is not applicable to such certificates as these. On its face the scrip bears evidence of its unusual character. It declares that the person to whom it is issued is entitled to a certain sum of money therein mentioned,

11—*Hackensack Water Co. v. DeKay*, 36 N. J. Eq. 548 (Court of Errors & Appeals, 1883).

12—*Lembeck v. Jarvis Terminal Cold Storage Co.*, 70 N. J. Eq. 757 (Court of Errors & Appeals, 1906).

13—*Hoskins v. Seaside Ice Mfg., etc., Co.*, 68 N. J. Eq. 476 (1905).

payable, ratably with other certificates issued pursuant to the resolution of April 10, 1871, at the pleasure of the company, with interest at the rate of seven per cent per annum. No warrant for this scrip would have been found in the charter, and the reference to the prohibitory limitation contained in the act concerning corporations would have removed all question, and would have been decisive against its validity."¹⁴

Bonds may be the subject of pledge.¹⁵

And it has been held that when coupon bonds having several years to run before they become due, are deposited as collateral security, for the payment of promissory notes soon to mature, the fair presumption is that they were designed to be held as a pledge and were expected to be sold after demand and due notice, like goods, chattels, stocks and public securities, in case the debt for which they were pledged should not be punctually paid.¹⁶

The holder of bonds taken as collateral security for an existing debt, is a bona fide holder for value to the same extent as though he was a purchaser for cash.¹⁷

A parol agreement to sell and assign a bond and mortgage is a contract for the sale of goods, wares and merchandise within the sixth section of the statute of frauds. "The words 'goods, wares and merchandise' in the sixth section of the statute are equivalent to the term 'personal property,' and are intended to include whatever is not embraced by the phrase, 'lands, tenements and hereditaments' in the preceding section."¹⁸

The legal rules that apply to the sale of a non-negotiable certificate of indebtedness, issued by a corporation, are the same that obtain when a chattel is sold, and there is, consequently, under ordinary circumstances, a warranty implied on such sale. Thus where the plaintiff purchased of the defendant, through a broker, what purported to be a certificate of a corporation declaring a scrip dividend of ten per cent on the amount of its capital stock, with interest, payable at the option of the company, which certificate was shown to be spurious and had been declared void by a decree in chancery, it was held that the plaintiff was entitled to recover the money thus paid from the defendant.¹⁹

14—Bailey v. Citizens Gas Light Co., 27 N. J. Eq. 196 (1876).

15—Morris Canal & Banking Co. v. Fisher, 9 N. J. Eq. 667 (Court of Errors & Appeals, 1855).

16—Morris Canal & Banking Co. v. Lewis, 12 N. J. Eq. 323 (Court of Errors & Appeals, 1858).

17—Lembeck v. Jarvis Terminal Cold Storage Co., 70 N. J. Eq. 757 (Court of Errors & Appeals, 1906); Hoskins v. Seaside Ice Mfg., etc., Co., 68 N. J. Eq. 476 (1905); Allaire v. Hartshorne, 21 N. J. Law, 665 (Court of Errors & Appeals, 1847); Armour v. McMichael, 36 N. J. Law, 92 (1872); Oliphant v. Vannest, 58 N. J. Law, 162 (Court of Errors & Appeals, 1895).

18—Greenwood v. Law, 55 N. J. L. 168 (Court of Errors & Appeals, 1892).

19—Wood v. Sheldon, 42 N. J. L. 421 (Court of Errors & Appeals, 1880). See also Strickland v. National Salt Co., 76 Atl. 1048 (1910).

No corporation shall hereafter plead or set up the defense of usury to any action brought against it to recover damages or enforce a remedy on any obligation executed by said corporation provided, that this act shall not apply to any such action which is now pending.²⁰

In a recent case counsel made a point that inasmuch as certain bonds were issued by a corporation to purchasers who paid eighty-eight per cent only of the par value of the bonds, therefore the holders of the bonds, by force of the usury act, were entitled to a lien for only eighty-eight per cent. of the face amount of the bonds. "The insistence is that, by force of the usury act, the bondholders could not maintain an action against the cold storage company to recover more than eighty-eight per cent. of the face value of these bonds. But against this position the bondholders invoke the provision of the act relating to usury passed in 1902. (P. L. 1902 p. 459.) * * * "The view of the counsel for the Erie railroad is that inasmuch as the present proceeding is not an action brought against the corporation, therefore the provision of the statute does not control in the present instance. It is obvious, however, that the statute was passed to protect those that had made loans of money and had taken the paper or bonds of a corporation. As to such creditors it was doubtless intended to abolish the defense of usury *in toto*. It seems obvious that if a subsequent encumbrancer can still attack a claim of such creditors on the ground of usury, the act itself could be easily defeated. Nor do I think that such a construction of the act has a logical foundation in our decision. * * * There are statutes in several states prohibiting the defence of usury on the part of corporations, and concerning them Mr. Cook remarks that in all the states the courts go to the extreme in defeating this defence, if possible. (Cook Corp., § 766b). Concerning the New York statute, it is to be remarked that in the case of *Vigilancia*, 68 Fed. Rep. 781, a New York Corporation had issued its bonds at eighty cents on the dollar, and creditors who held judgments subsequent to the mortgage securing these bonds, attacked the bonds as having been issued usuriously. It was held, however, in the Federal district court, and afterwards in the circuit court of appeals (73 Fed. Rep. 452), that the New York act shut off not only the corporation itself, but all creditors of the corporation, from availing themselves of the statute of usury."²¹

The statute does not disturb the general rate of interest but in effect repeals all penalties against a higher rate as to corporations, and leaves parties at liberty to make a special contract with a corporation without limitation.²²

Before the act of 1902 was passed it was held that where a corporation of this state made a promissory note in New York, payable there,

20—P. L. 1902, p. 459. See as to application of this act, *Mazarin v. Hudson County Real Estate, etc., Co.*, 76 Atl. 322 (1910).

21—*Lembeck v. Jarvis Terminal Cold Storage Co.*, 70 N. J. Eq. 757 (Court of Errors & Appeals, 1906).

22—*Bramhall v. Atlantic National Bank*, 36 N. J. L. 243 (1873).

with endorsers, at a larger rate of interest than the general statute of such state permits, but in which state by virtue of another statute no corporation can interpose the defence of usury, neither the corporation nor such endorsers can set up the defense of usury.²³

And in *Freese ads. Brownell*, 35 N. J. L. 285 (1871), it was held that the defense of usury, when unavailing to a corporation, cannot be invoked by its surety.

Where nothing appears in the body of a note to indicate who is the maker and it is signed by a person who affixes to his name an official title as officer of a corporation, it is held that the note is *prima facie* that of the person so signing; but that it is so far ambiguous, in respect to the question whether the officer or the corporation is the maker, that parol testimony is admissible to settle it. If, however, the note is signed by the corporate name, followed by the name of a corporation officer, who affixes to his name his official title, such note is conclusively taken to be corporation paper.

A promissory note made in this form, "We promise to pay to the order of the sum of, " and signed, "Warrick Glass Works, J. Price Warrick, Prest.," is the note of the corporation, and not the note of Warrick, or the joint note of Warrick and the corporation.²⁴

In *Shotwell v. McKown*, 5 N. J. L. 973 (1820), where the note, which read, "Three months after date the Patent Cloth Manufacturing Company promise to pay William Frazee or order, at their manufactory, one hundred thirteen and 1/100 dollars, with interest, value received, without defalcation or discount," and was signed "William Shotwell, Agent," it was held that said Shotwell was not answerable in his individual capacity.

A bill of Exchange signed J. K., President of E. & S. R. R. Co. leaves it ambiguous on the face of it. In such case, without any explanatory proof, J. K. individually would be considered the drawer of the bill.²⁵

A promissory note in the following form: "One day after date we, the trustees of Musconetcong Grange, No. 114, known as W. Flemming and Company, promise to pay Emma Vliet or bearer the sum of one thousand dollars for value received, with interest at 5½ per cent. from date" and signed "Trustees, Wm. M. Simanton, Isaac Woolverton," was held by the Court of Errors and Appeals to be ambiguous, and it was held that parol proof to show the real character of the liability was permissible.²⁶

23—*Lane v. Watson*, 51 N. J. L. 186 (1889).

24—*Reeve v. First National Bank of Glassboro*, 54 N. J. L. 208 (1891).

25—*Kean v. Davis*, 21 N. J. L. 683 (Court of Errors & Appeals, 1847).

26—*Simanton v. Vliet*, 61 N. J. L. 595; see also *Vliet v. Simanton*, 63 N. J. L. 458 (1899).

81. CORPORATE MORTGAGES AND DEEDS OF TRUST; FORECLOSURE PROCEEDINGS.

Corporate mortgages are of two general kinds, the ordinary mortgage to a determinate mortgagee or mortgagees, usually accompanied by a bond, and the mortgage deed of trust, to a trust company or other trustee, given to secure an issue of bonds or other securities. In respect to the subject matter of the mortgage, deeds of trust by way of mortgage may be divided into three general classes, real estate mortgages, chattel mortgages and collateral trust mortgages. Or the same mortgage may include within its lien all or any two of such kinds of property.

Corporations that have the power to borrow money, have also the necessary power, as well as the legal right, to give obligations for its repayment in any form not expressly forbidden by law.¹

The execution of mortgages, both real and personal, to trustees is the exertion of a legal right.²

A corporation mortgage may be proved by the president or secretary, if signed by them, though they signed it by order of the board of directors. They may be regarded as subscribing witnesses within the meaning of the act respecting conveyances, but it cannot be proved by one who did not sign the mortgage. It is not requisite to a compliance with the statute, in regard to proof of such instruments, that the contents of the instrument were made known to the mortgagor. A record of a mortgage made by transcription from a copy of the mortgage, examined by the clerk, on production to him of the original, is in conformity with the requirements of the statute.³

A mortgage-deed to trustees for bondholders, from which words of inheritance have been inadvertently omitted, will be reformed as against subsequent encumbrances and purchasers with notice. Whether a fee is intended to pass or not, by a trust-deed, may be gathered from its provisions, in the absence of words of inheritance.⁴

Thus it was held that a railway mortgage made to trustees without words of inheritance, but empowering the trustees, on default, to sell the mortgaged premises and to convey to the purchaser "all the estate, right, property and interest, and to the same extent as the railroad company had therein at the date of the mortgage, etc.," would be rectified so as to convey a fee. The court may direct the trustees to convey all their title to the purchaser at the foreclosure sale in aid of the execution.⁵

The receiver of an insolvent corporation cannot successfully assail

1—Stratton v. Allen, 16 N. J. Eq. 229 (1863).

2—Muchmore v. Budd, 53 N. J. L. 369, 387 (Court of Errors & Appeals, 1891).

3—Coe v. N. J. Midland Ry. Co., 31 N. J. Eq. 105 (1879).

4—Randolph v. N. J. West Line R. R. Co., 28 N. J. Eq. 49 (1877); Coe v. N. J. Midland Ry. Co., 31 N. J. Eq. 105 (1879).

5—Coe v. N. J. Midland Ry. Co., 31 N. J. Eq. 105 (1879).

a mortgage given by the corporation because it was executed for an antecedent debt.⁶

The right to execute a mortgage which shall include corporate franchises in its lien, cannot exist as an implied power. The right exists in virtue of the general corporation act which provides "That every corporation as such shall be deemed to have power * * * to mortgage any such real or personal estate with their franchises."⁷

A mortgage may be made a lien on the outstanding book accounts due to a mortgagor and also upon such book accounts as shall thereafter become due to the mortgagor in the regular course of his business.⁸

The rule is that an assignment of an account not yet due, if absolute in form, is not to be construed as a mere covenant to pay out of the fund because the assignor therein agrees to act as agent of the assignee in collecting the money; an equitable assignment of money to be earned, operates upon the fund as soon as it is earned.⁹

In *Miller ads. Pancoast*, 29 N. J. L. 250 (1861), it was held by the Supreme Court that possession of personal property by a mortgagor, after a mortgage of the property, is *prima facie* evidence of fraud, but may be explained. Whether the transaction is fraudulent or not, is a question of fact to be settled by the jury. If a merchant or manufacturer mortgage his stock of goods, and the mortgagee permits the mortgagor to remain in possession of the property, and sell it in the usual course of trade, the mortgagor will be considered acting as an agent of the mortgagee, and as receiving the money for him; but it would be otherwise if the whole stock should be sold together, or in any other manner than in the usual course of business.

A mortgage of a stock of merchandise which contains an authority to the mortgagor, authorizing him to sell in the usual course of his business, is not, *per se*, fraudulent. The question whether such a mortgage is fraudulent or not is a question of fact, to be determined by proof in the same manner as other questions of fact are determined.¹⁰

Vice-Chancellor Van Fleet said: "The question is this: Is the mortgage of a stock of merchandise, which by its terms permits the mortgagor to sell the property mortgaged in the usual course of business, and also provides that its lien shall extend to such goods as may be subsequently purchased to replace those sold, fraudulent, *ipso facto*, as

6—*Kuser v. Wright*, 52 N. J. Eq. 825 (Court of Errors & Appeals, 1894). See also *Regina Music Box Co. v. Otto & Sons*, 65 N. J. Eq. 582 (1903); affirmed 68 N. J. Eq. 801 (Court of Errors & Appeals, 1905).

7—*Thatcher v. Consumers Gas & Fuel Co.*, 72 N. J. Eq. 825 (1907).

8—*Buvinger v. Evening Union Printing Co.*, 72 N. J. Eq. 321 (1907).

9—*Cogan v. Conover Mfg. Co.*, 69 N. J. Eq. 809 (Court of Errors & Appeals, 1906); *Bower v. Hadden Blue Stone Co.*, 30 N. J. Eq. 171 (1878); affirmed 30 N. J. Eq. 340 (1878); *Bank of Harlem v. Bayonne*, 48 N. J. Eq. 246 (1891); affirmed 48 N. J. Eq. 646 (1891); *Terney v. Wilson*, 45 N. J. Law, 282 (1883).

10—*Lister v. Simpson*, 38 N. J. Eq. 438 (1884); affirmed 39 N. J. Eq. 595 (Court of Errors & Appeals, 1885). See also *Miller ads. Pancoast*, 29 N. J. L. 250 (1861).

to creditors?" He answered both questions in the negative, although it appeared that the stock mortgaged had been almost entirely changed, and that nearly all the goods purchased to replace the goods sold had been furnished by the execution creditor, who had actually levied and who was claiming, by virtue of his levy, priority over the lien of the mortgage.¹¹

But to constitute a valid mortgage *at law* the mortgagor must have a present property, either actual or potential, in the thing sold. Where there is a mortgage of goods to be thereafter acquired by the mortgagor, an execution levied upon the goods after they are so acquired will, in a court of law, prevail over the mortgage.¹²

In equity, however, a mortgage of personal property afterwards to be acquired by the mortgagor, attaches to the property as soon as it is acquired by the mortgagor.¹³

"If the company acquired, as the petitioners insist they did, after the delivery of the mortgage, the property in question, among which are the Long Branch & Sea Shore Railroad and its appurtenances, and the vessels above mentioned, the lien of the mortgage attached to it the instant it was so acquired, and by operation of these covenants, they held it on, and subject to the trusts of the mortgage."¹⁴

Where a mortgage attaches to after acquired property, and additions are made to the premises, after the title becomes vested in the mortgagor, by the erection of buildings, or the construction of embankments, or the laying of rails for a track, such additions become part of the mortgaged premises, as they are made on the maxim *quicquid plantatur solo, solo cedit*, and enure to the benefit of the mortgagee. But where the after acquired property comes into the hands of the mortgagor, subject to encumbrances, or liable to liens, the mortgage attaches to the property in the condition in which it comes to the mortgagor's possession, subject to such liens and encumbrances as are then on it.¹⁵

When a mortgage is given by a railroad company on its franchises and on its roads to be thereafter built, and a branch road, not in contemplation at the date of such encumbrances, is afterwards laid and built, such branch road will pass under such mortgage subject to the burthens put upon it by the company in the course and as incidents of its acquisition.¹⁶

11—*Lister v. Simpson*, 38 N. J. Eq. 428 (1884); affirmed 39 N. J. Eq. 595 (Court of Errors & Appeals, 1885).

12—*Looker v. Peckwell*, 38 N. J. L. 253 (1876); affirmed 39 N. J. L. 134 (Court of Errors & Appeals, 1876).

13—*Williamson v. N. J. Southern R. R. Co.*, 29 N. J. Eq. 311 (Court of Errors & Appeals, 1878); *Smithurst v. Edmunds*, 14 N. J. Eq. 408 (1862); *Gevers v. Wright*, 18 N. J. Eq. 330 (1867); *Willink v. Morris Canal & Banking Co.*, 4 N. J. Eq. 377 (1843); *Collerd v. Tully*, 77 Atl. 1079 (1910).

14—*Williamson & Upton v. New Jersey Southern Railroad Co.*, 25 N. J. Eq. 13 (1874).

15—*Williamson v. N. J. Southern R. R. Co.*, 29 N. J. Eq. 311 (Court of Errors & Appeals, 1878).

16—*Coe v. D. L. & W. Railroad Co.*, 34 N. J. Eq. 266 (Court of Errors & Appeals, 1881).

Where a corporation executed a mortgage on all its property, of every nature and description, whether then owned or thereafter acquired by it; and afterwards bought a lot, moved a house belonging to it thereon, put a cellar under it, and placed it in condition for occupation, it was held that it thereby acquired the equitable title to the lot, to which the lien of the mortgage attached, subject to the lien of the vendor for the purchase money.¹⁷

A chattel mortgage will cover after-acquired property only when such intention clearly appears in the instrument.¹⁸

If a corporation mortgage to trustees to secure an antecedent indebtedness, pursuant to an agreement made with a creditor to whom such mortgage is to be given, and the mortgage, by its terms, is made to cover property then owned and afterward to be acquired, and contains a power authorizing trustees to sell on default of payment, and a further provision that the trustees shall certify and deliver the bonds secured to or upon the order of the company, such mortgage is not fraudulent and void under the rule laid down in *Owen v. Arvis*, 26 N. J. L. 22 (1856), and *National Bank of Metropolis v. Sprague*, 21 N. J. Eq. 530 (Court of Errors and Appeals, 1870), where the company was solvent at the time the mortgage was given.

"The second insistent of the receiver presents the question whether a purchaser of the equity of redemption in personal property, which he takes subject to a mortgage containing a covenant that all after-acquired property brought on the premises by the original mortgagor, shall be subject to the lien of the mortgage, is bound by that covenant to the extent of having all he may purchase and bring on the premises by way of increase or in substitution of that exhausted in the ordinary conduct of the business, made liable for a debt he neither created nor assumed. The right of a chattel mortgagee to perfect his lien upon after-acquired property, when his mortgage, by its terms, is made to extend to such chattels, is based in equity upon the theory that such an agreement is a present contract to give a lien, which becomes effective as soon as the property comes into the ownership of the mortgagor or contractor, and may then be enforced in equity subject to any defence that would be available against a bill for specific performance. The relief is in the nature of specific performance, and is applicable only where the contract is such as, under the circumstances, would be the subject of a decree for specific performance against the mortgagor, or his assignee with notice, as to such chattels as the mortgagor had purchased and then assigned."²⁰

17—*Monmouth County Electric Co. v. McKenna*, 68 N. J. Eq. 160 (1905); affirmed 69 N. J. Eq. 841 (Court of Errors & Appeals, 1906).

18—*Cunningham v. Alryan Woolen Mills*, 69 N. J. Eq. 710 (1905); *Colcler v. Tully*, 77 Atl. 1079 (1910).

19—*Regina Music Box Co. v. Otto & Sons*, 65 N. J. Eq. 582 (1903); affirmed 68 N. J. Eq. 801 (Court of Errors & Appeals, 1905).

20—*Fidelity Trust Co. v. Staten Island Clay Co.*, 70 N. J. Eq. 550 (1905); see also *Williamson v. New Jersey Southern R. R. Co.*, 29 N. J. Eq. 311 (Court of Errors & Appeals, 1878); *Smithurst v. Edmunds*, 14 N. J. Eq.

In *McMillan v. N. Y. Water Proof Paper Co.*, 29 N. J. Eq. 610 (1878) the Court of Errors and Appeals held that the criteria to determine whether property is real or personal are, annexation, appropriation and intention to make permanent accession to the freehold.

In *Feder v. VanWinkle*, 53 N. J. Eq. 370 (1895), the Court of Errors and Appeals established the rule which distinguishes between chattels which become part of the realty and those which retain the character of personality as follows:

Chattels must, to constitute them fixtures, be actually annexed to the real estate or something appurtenant thereto. They need not necessarily be attached to the building; that is one way of annexing them to the soil, but not the only way. To satisfy this test, it is not material whether the substructure is brick or wood, or whether the machinery is annexed to the building or rests upon a foundation securely laid for it in the soil, and to which it is fastened. The fact that the chattels in controversy may be removed and sold for other uses, or that they were not made for special adaption to the buildings in which they are placed, is not decisive of their character. Those qualities are mere circumstances to be considered. There must be actual annexation with an intention to make a permanent accession to the freehold, but it is not necessary that there be an intention to make the annexation perpetual. The intention must exist to incorporate the chattels with the real estate for the uses to which the real estate is appropriated, and there must be the presence of such facts and circumstances as do not lead to but repel the inference that it is intended to be a temporary annexation.²¹

Whenever chattels have been placed in and annexed to a building by their owner, as a part of the means by which to carry out the purposes for which the building was erected, or to which it has been adapted, and with the intention of permanently increasing its value for the use to which it is devoted, they become fixtures, as between the owner and his mortgagee. "In the earlier cases, decided not only in the supreme court and the court of chancery, but also in this court, in determining whether such intention existed with respect to a given machine, the conclusion seems to have been rested very largely upon the method adopted in making the annexation, and but little consideration given to the relation which the machine bore to the building in which it was located, or to the other machinery in conjunction with which it was used. In *Feder v. Van Winkle*, 53 N. J. Eq. 370, this court took a more comprehensive view of the subject than had been done in the earlier cases, and gave controlling weight to the object for which, rather than to the method by which, the annexation was made, and declared that

408 (1862); *Shaw v. Glen*, 37 N. J. Eq. 32 (1883); *Howell v. Francis*, 10 Atl. 436 (1887); *Dunn v. Hastings*, 54 N. J. Eq. 503 (1896); *Cumberland Bank v. Baker*, 57 N. J. Eq. 231 (1898); *Stoll v. Sibson*, 65 N. J. Eq. 552 (1903); *Cunningham v. Alryan Woolen Mills*, 69 N. J. Eq. 710 (1905); *Colterd v. Tully*, 76 Atl. 1079 (1910).

21—*Feder v. Van Winkle*, 53 N. J. Eq. 370 (Court of Errors & Appeals, 1895).

the physical annexation to the freehold of machinery that was so fitted for and applied to the use to which the realty was appropriated; that the machinery and buildings became unified and incorporated together, as a whole, for the prosecution of a common purpose for an indefinite period (i. e., so long as the business engaged in should be carried on successfully), indicated that such machinery was designed to be, not a temporary, but a permanent, accession to the freehold. In the later case of *Temple Company v. Penn Mutual Life Insurance Co.*, 69 N. J. L. 36, decided by the supreme court at the February Term, 1903, the same learned jurist who wrote the opinion in *Feder v. Van Winkle*, in discussing the question whether certain chattels which had been placed in a building designed for and used as a theatre (and, of course, annexed thereto) were fixtures, declared that 'whatever was incorporated with the building to fit it for use as a theatre became part of the realty.' The rule laid down in *Feder v. Van Winkle*, and followed in *Temple Company v. Penn Mutual Life Insurance Co.*, states the true principle to be applied in the determination of the question when it is presented. Whenever chattels have been placed in, and annexed to, a building by their owner as a part of the means by which to carry out the purposes for which the building was erected, or to which it has been adapted, and with the intention of permanently increasing its value for the use to which it is devoted, they become, as between the owner and his mortgagee, fixtures and as much a part of the realty as the building itself. And this is true notwithstanding that such chattels may be severed from, and taken out of, the building in which they are located without doing any injury either to them or to it and advantageously used elsewhere, and notwithstanding that the building itself may thereafter readily be devoted to a use entirely different from that which was contemplated when the annexation was made."²²

A mortgage executed by a laundry company, after describing the lands mortgaged, continued: "And all personal and mixed estate, * * * and also all machinery, boilers, engines and fixtures of every description." The machinery included an engine, boiler and shafting, the engine being bolted to a stone, brick or cement foundation; ironing machines made of steel rollers, connected above to the shafting by a pulley and belt and connected underneath, as well as from above, with the boiler by steam pipes; an "annihilator," fastened by lag screws and connected with the boiler and with the shafting; washing machines bolted to the floor and connected with the shafting by pulley and belt; and other laundry machinery similarly attached. It was held that such things were part of the real estate and covered by the mortgage though it was recorded only as a real and not as a chattel mortgage.²³

²²—*Knickerbocker Trust Co. v. Penn Cordage Co.*, 66 N. J. Eq. 305 (Court of Errors & Appeals, 1904); see also *Security Trust Co. v. Temple Co.*, 67 N. J. Eq. 514 (1904).

²³—*Atlantic Safe Deposit & Trust Co. v. Atlantic City Laundry Co.*, 64 N. J. Eq. 140 (1902); see also *Lee v. Hubschmidt Building & Woodworking Co.*, 55 N. J. Eq. 623 (1897).

In *Williamson v. N. J. Southern R. R. Co.*, 29 N. J. Eq. 311 (1878), the Court of Errors and Appeals held that the engines, cars and rolling stock of a railroad must be regarded as chattels, which have not lost their distinctive character as personalty by being affixed to and made part of the realty, and that a mortgage executed by a railroad corporation on its road-bed and franchises, together with its engines, cars and rolling stock, so far as regards the latter class of property, is a chattel mortgage within the provisions of the act concerning chattel mortgages. And in *Speiden v. Parker*, 46 N. J. Eq. 292 (Court of Errors and Appeals, 1889), it was held that railroad cars are not fixtures.

Chancellor Williamson, assisted by Justice Ford, in October, 1821, decided in the case of executors of Ann Plume, deceased, v. Christian Bone, and others (13 N. J. L. 63)—“That a mortgage given in February, 1814, but not recorded till the 22nd of November following, was notice to a mortgagee, who took her mortgage on the 4th of January, 1815, and had it recorded on the 19th of the same month. In that case it was held that there was nothing in the act of the 7th of June, 1799, which made it absolutely necessary to the validity of a mortgage, that it should be recorded within thirty days after making it; and that a mortgage might be duly recorded within the provisions of the act, although the thirty days had previously expired; and that the registry of all mortgages duly recorded was notice to all subsequent purchasers or mortgagees.” (See the statutory provision on this subject, Part II of this book.)

An unrecorded mortgage is without validity as to the creditors of a corporation, who, upon the appointment of a receiver in insolvency proceedings, have their claims fastened upon the property.²⁴

In *Von Schuller v. Commercial Investment Building & Loan Assn.*, 63 N. J. Eq. 388 (1902), it was held that a mortgagee was entitled to the benefit of the recording acts as of the date the mortgage was delivered to the register, although it was not actually recorded until a later day. Vice-Chancellor Pitney said: “The statute makes it the duty of the clerk to provide certain books and to record without delay every instrument of a character mentioned in section 20 in the proper book; but it is a matter of common knowledge that such instruments cannot be and are not immediately recorded. Every person who examines the records for instruments of that kind, knows that there are a number of instruments to be transcribed, and it is his duty to look among those instruments if he wishes to make a complete search to date.”

Shares of capital stock of a corporation are not goods and chattels within the meaning of the act concerning chattel mortgages. Hence, a mortgage of such stock need not be filed in accordance with the provisions of that act.²⁵

A mortgage of a leasehold for a term of two years or more, is a mortgage of realty within the purview of the act respecting conveyances,

24—*Hebbard v. Southwestern Land & Cattle Co.*, 55 N. J. Eq. 18 (1896).

25—*Williamson v. N. J. Southern Railroad Co.*, 26 N. J. Eq. 398 (1875).

and it is not necessary to record a mortgage thereof as a chattel mortgage.²⁶

Where a mortgage includes chattels as well as real estate, it must be separately recorded as a chattel mortgage (see Part II of this book). In a recent case the court said:

"The contention first advanced on behalf of the appellant is that the recording of its mortgage among the records of real estate mortgages was a sufficient compliance with the provisions of the Chattel Mortgage act. It is not necessary to repeat the argument made in support of this contention. It is enough to say that the proviso, contained in section 4 of the act, makes it plain that, with the exception of the class of mortgages designated therein, every mortgage which covers both real and personal property must, in order to make it a valid lien upon both classes of property as against creditors, be recorded not only among the records of real estate mortgages, but also in one of the books which the statute under consideration requires to be provided for the recording of chattel mortgages.

"The solution of the question must depend upon whether the lodging of the appellant's mortgage for record as a mortgage of chattels (for this we consider to have been the effect of the letter of instructions sent by the appellant to the clerk with its mortgage) was, within the meaning of the statute, a recording of that instrument, notwithstanding that it was never in fact transcribed in the official book provided for the purpose. It was held by the learned vice-chancellor, in the court below, that a transcription of the mortgage in the chattel mortgage book was necessary in order to make it valid as against creditors. In this view we concur. The statute, in express words, requires that there shall be an actual recording of these instruments in books specially provided, and declares that they shall be absolutely void against creditors unless so recorded. To say that a chattel mortgage, which has been left for record but which is afterward returned to the owner unrecorded in fact, has, nevertheless, been recorded in contemplation of law, is to disregard the plain meaning of the words used in the statute, and to arbitrarily construe them in such a way is to make the statute embrace a case not covered by it.

"We do not, however, concur in the view, which seems to have been held by the vice-chancellor, that, by force of the provision of section 9 of the act, a chattel mortgage is void as against creditors until it is actually transcribed in the records. The seventh section of the act requires the clerk to enter, at the foot of the record, the time when the mortgage was received by him for record, and also to endorse that time on the instrument itself. Manifestly the purpose of this requirement was to advise persons who should inspect either the record or the mortgage itself of the time when the instrument was lodged for record, and no reason can be perceived for affording this information, unless it was

²⁶—Lembeck & Betz Eagle Brewing Co. v. Kelly, 63 N. J. Eq. 401 (1902).

intended that the record, when made, should relate back to that time; in other words, that the deposit of the instrument for record, and its transcription in the record, should be presumed to have occurred at one and the same time. It follows, therefore, that, as soon as a chattel mortgage is deposited for record in the clerk's office, it must be presumed to have been forthwith transcribed in the records; and that presumption continues so long as it remains in the office and until it is actually transcribed; and when that is done the presumption becomes conclusive. When, however, the mortgage is taken away from the clerk's office, without having been recorded, the presumption raised by the statute, being contrary to the fact, ceases to exist and the mortgage stands in the same condition, so far as creditors are concerned, as if it had never been lodged for record."²⁷

The Chattel Mortgage Act was not repealed by the provisions of an act respecting conveyances (Revision of 1898) relating to the recording of certain chattel mortgages and conveyances of personal property.²⁸

The ninth section of the Chattel Mortgage Act has a twofold purpose: First, it changed the previously existing law requiring a mortgage to be refiled, by providing that when once recorded according to the act, it should be valid until canceled; second, it enables the mortgagee, who fails to record his mortgage immediately, to preserve his lien as against all persons who become creditors of the mortgagor after the mortgage is actually recorded, and in that respect puts him on the same footing with one who purchases or takes a mortgage after the prior mortgage is recorded.²⁹

By virtue of the 9th section of the Chattel Mortgage act of May 22nd 1885, the mortgagee will have priority over all creditors of the mortgagor, where the debt or obligation is incurred after the mortgage is recorded, although it is not recorded immediately. Creditors of the mortgagor who have claims in their own right before the chattel mortgage is recorded, or who acquire by assignment claims which accrued before the mortgage is recorded, will be entitled to priority over the mortgagee, and may on recovery of judgment assert their rights notwithstanding a voluntary assignment by the mortgagor for the equal benefit of creditors.³⁰

In *Roe v. Meding*, 53 N. J. Eq. 350 (1895), the Court of Errors and Appeals declared that the requirement of the fourth section of the Chattel Mortgage Act, is for immediate recording or immediate taking possession, for the obvious reason that one or the other is necessary to give notice to possible creditors of the mortgagor of the mortgagees

27—Knickerbocker Trust Co. v. Penn Cordags Co., 66 N. J. Eq. 305 (Court of Errors & Appeals, 1904).

28—Brown v. Harris, 67 N. J. L. 207 (1901).

29—*Roe v. Meding*, 53 N. J. Eq. 350 (Court of Errors & Appeals, 1895).

30—Wimpfheimer v. Perrine, 67 N. J. Eq. 597 (Court of Errors & Appeals, 1901).

interest in the goods. In that case the delay in recording was less than three months, yet it was held to invalidate the chattel mortgage. The court held that under the fourth section of the Chattel Mortgage Act of May 2, 1885, unless the mortgagee takes possession or records his mortgage immediately, his mortgage is postponed as to all creditors, whether they became such before or after the mortgage was recorded or possession taken. That section applies not alone to "judgment creditors" but to all creditors of the mortgagor. Immediate possession or immediate recording means as soon as may be by reasonable diligence and dispatch under the circumstances of the case.

In *Pryor v. Gray*, 70 N. J. Eq. 413 (1905); affirmed 72 N. J. Eq. 436 (Court of Errors and Appeals, 1907), it was held that a chattel mortgage made July 13, 1904, and not recorded, where possession of the property was not taken thereunder until December 6, 1904, was voidable, at the suit of a receiver in insolvency, who was appointed on December 16, 1904.

A chattel mortgage, void as to creditors, for want of the statutory affidavit and proper record, is a lien upon the property mortgaged so far as the rights of the parties to the instrument are affected. Such a mortgage is valid against the claims of the receiver of an insolvent corporation, unless it is made to appear that he is contesting it for the benefit of creditors, whose debts have been fastened on the personal property of the corporation by virtue of the insolvency proceedings.³¹

Vice-Chancellor Bergen said: "The question presented on the final hearing of this cause having been disposed of in accordance with the situation then existing, application is now made for a rehearing, and an order permitting the defendant Dickinson [the receiver of the purchaser of the mortgaged chattels] to amend his answer so that it may set out that, as receiver of the defendant corporation, he represents creditors whose debts are unpaid, and also for permission to submit testimony in support of such amendment, it being suggested to the court that this defense was inadvertently overlooked by counsel on the former hearing." The motion was granted, Vice-Chancellor Bergen saying: "Before the Recording Act, chattel mortgages, unaccompanied by change of possession, were prima facie fraudulent, as to creditors, mortgagees or purchasers, without notice, the fraud inferred, however, being subject to explanatory evidence of the bona fides of the transaction, and the act referred to was passed to enable the holder of a mortgage to permit the owner to retain possession, and at the same time warn all who might give credit to the owner because of his possession of the goods that there was an outstanding claim against them. This mortgage in the absence of the statute, would be void as to every creditor of a subsequent owner of the goods who might obtain a lawful lien thereon, because possession of the goods had not been taken by the mortgagee, unless such non-transfer was satisfactorily explained, for

31—*Fidelity Trust Co. v. Staten Island Clay Co.*, 70 N. J. Eq. 550 (1905).

such neglect to take possession was held to be prima facie fraudulent. * * * I think the words and plain intent of the act are * * * that it makes such mortgages void as against the creditors of any owner holding the property subject to such unrecorded mortgage with the knowledge and consent of the mortgagee. When conditions change, and innocent parties may suffer, it becomes the duty of the mortgagee to warn them by taking possession, if he desires to obtain priority of lien. My conclusion is that, under the conditions present here, this mortgage is void as against the creditors of the purchasers from the mortgagor, and that the Recording act does not remove the imputation of fraud which the common law attached to a chattel mortgage of goods unaccompanied by change of possession, and that while it may not be void as to the purchaser because of notice, such notice is not chargeable to his creditors. It therefore follows, that if this applicant can support with evidence the allegations he proposes to incorporate in his amended answer, this mortgage would be void as to such creditors, and I will allow the motion."³²

Where a chattel mortgage, reciting the debts which it was given to secure, is recorded in pursuance of the provisions of the statute, its recitals are evidence of the existence of the debts against subsequent creditors of the mortgagor, notwithstanding the mortgagor has retained possession of the chattels. Mr. Justice Dixon said: "But the force of such evidence against creditors would, at common law, have been overcome by the fact that possession of the chattels remained with the mortgagor, that circumstance being, at common law and in favor of creditors, prima facie evidence of fraud (Miller ads. Pancoast, 29 N. J. L. 250), which could not be rebutted without further proof that the mortgage itself afforded of a valuable consideration. But now, under the statute above quoted, chattel mortgages, when recorded pursuant to the provisions of the act, become valid against the creditors of the mortgagor, notwithstanding his retention of possession. In the validity thus established is included the evidential efficacy of all recitals in the instrument with regard to facts that go to constitute the mortgage, among them the indebtedness to be secured."³³

The affidavit of consideration annexed to a chattel mortgage must, on its face, or by reference to the annexed mortgage, show how the relation of creditor and debtor arose between the mortgagee and the mortgagor.³⁴

"The law requires that the statement shall be true, not that the affiant shall know it to be true. Had the statute not indicated the person who was to make the affidavit, then it might well have been assumed that it was to be made by one cognizant of the facts; but here the

32—Fidelity Trust Co. v. Staten Island Clay Co., 70 N. J. Eq. 558 (1905).

33—Fletcher v. Bonnet, 51 N. J. Eq. 615 (Court of Errors & Appeals, 1893).

34—Dunham v. Cramer, 63 N. J. Eq. 151 (1902).

person or class of persons is designated, without reference to their knowledge. It may often happen that no person within the class is directly cognizant of 'the consideration of the mortgage and the amount due and to grow due thereon,' as in the case of an assignee of a pre-existing debt, or an executor or administrator, taking security for a debt due the decedent, yet certainly such a person may become 'the holder' of a chattel mortgage, and must be competent to make the statutory affidavit."³⁵

Where a chattel mortgage is made and delivered to a trustee for creditors, he, as holder, is competent to make the affidavit required by statute to give the mortgage full effect.³⁶

Where a corporation is the holder of the mortgage an affidavit of consideration, made by the vice-president, is valid without any allegation of specific authority. The court held that the fact appearing that the affidavit was made by such officer was *prima facie* evidence that he was acting in his proper official capacity and by authority.³⁷

In *Watson v. Rowley*, 63 N. J. Eq. 195 (1902), it was held that the mortgagor cannot act as the agent of the holder in making the affidavit.

In *Miller v. Gourley*, 65 N. J. Eq. 237 (1903), the affidavit of the mortgagee annexed to the mortgage stated the true consideration of the mortgage to be "Twenty Thousand Dollars, two thousand dollars thereof in cash loaned by the mortgagee to the mortgagor, and the balance thereof in work and labor performed by the mortgagee for the mortgagor at its request." The evidence showed that this was not the true consideration of the mortgage. It was held in a suit by the receiver, that the mortgage was wholly invalid as a chattel mortgage, under the provisions of section 4 of the Chattel Mortgage act.

A chattel mortgage had annexed thereto an affidavit made in Pennsylvania, before a notary public of that state, but the jurat did not contain a recital that the officer taking the affidavit was a notary public, as provided for in section five of the Oaths Act. It was held, that such mortgage was not void as to the creditors of the mortgagor for lack of such recital.³⁸

A mortgage may be discharged either by entry by a clerk on the margin of the registered mortgage of the minute of its discharge (2 Gen. Stat. p. 2107, § 23), or by an acknowledged certificate which should be recorded (§ 25).³⁹

35—*Fletcher v. Bonnet*, 51 N. J. Eq. 615 (Court of Errors & Appeals, 1893).

36—*Fletcher v. Bonnet*, 51 N. J. Eq. 615 (Court of Errors & Appeals, 1893).

37—*American Soda Fountain Co. v. Stolzenbach*, 75 N. J. L. 721 (Court of Errors & Appeals, 1908).

38—*Magowan v. Baird*, 53 N. J. Eq. 656 (Court of Errors & Appeals, 1895). See also *Earle v. National Metallurgic Co.*, 76 Atl. 555 (1910).

39—*Manchester B. & L. Association v. Beardsley*, 72 N. J. Eq. 714 (1907).

A mortgagor will not be permitted to permit waste upon the mortgaged premises to the extent of rendering them an insufficient security for the mortgage debt. No authority to permit waste upon mortgaged premises will be implied from the object for which the property was purchased nor from the price agreed to be paid.⁴⁰

The mortgagee may invoke the restraining power of a Court of Equity to prevent injury to his security by waste being actually committed or threatened. For trivial acts of waste, the courts will not interfere, but when the mortgagor's security is upon the plant and franchises of a corporation engaged in the quasi public business of carrying passengers by means of the mortgaged premises, and when it is made to appear that a course of conduct is threatened by the mortgagor and others with the mortgagor's connivance and consent and about to be pursued, which it may reasonably be inferred may result in preventing or diminishing the power to make profitable use of the plant under the franchises, a case is made which justifies the intervention of the mortgagee and requires the court to interfere to protect his interest.⁴¹

While a mortgagor or an owner of premises subject to a mortgage is entitled to manage, control and dispose of the mortgaged premises at his pleasure, yet, the mortgagee thereof may demand relief against the mortgagor or his assigns, owners of the mortgaged premises or lessees thereof, if their acts, if carried out according to their contracts and proposed plans, will operate to depreciate the value of the property upon which the mortgage is security, and may obtain relief against the execution of the plan proposed by the lease and contract between the owner and the lessee if the plan tends to diminish the power of the street railway corporation to operate its plant under its franchises with profit.⁴²

At common law the mortgagor could not plead a suit in equity on a mortgage, for a foreclosure, as a bar to an action at law on the bond, to secure which the mortgage had been given.⁴³

In a strict foreclosure at common law the decree simply cut off the equity of redemption and foreclosed the mortgagor from redeeming his estate by payment of the mortgage debt; and the estate of the mortgagee, which in its inception was conditional and defeasible, became thereby absolute. Thereafter the mortgagee was, as of the estate granted and conveyed by the mortgage, discharged from the condition of defeasance, and he held the estate as if the original conveyance had been absolute. In a suit by a mortgagee to enforce his mortgage, whether by scire facias or by bill for foreclosure and sale, a purchaser

40—*Coggill v. Milburn Land Co.*, 25 N. J. Eq. 87 (1874).

41—*Fidelity Trust Co. v. Hoboken & Manhattan Railroad Co.*, 71 N. J. Eq. 14 (1906).

42—*Fidelity Trust Co. v. Hoboken & Manhattan Railroad Co.*, 71 N. J. Eq. 14 (1906). As to foreclosure of mortgages, see Part II of this book.

43—*Copperthwait v. Dummer*, 18 N. J. L. 258 (1841).

at the sale of the mortgaged premises takes the place of the mortgagee in proceedings in strict foreclosure at common law. His title relates back to the time of the execution of the mortgage. He succeeds as well to the title and estate acquired by the mortgagee, by the delivery of the mortgage deed, as to the estate the mortgagor had at the time of the execution of the mortgage. Certain acts of 1880 and 1881⁴⁴ subjected the estates of mortgagees to conditions of redemption which did not previously exist.

As applied to antecedent mortgages these acts were held to be unconstitutional and void, in that they subjected the purchaser's title to redemption after sale, thereby diminishing the vendible value of the mortgage estate and impairing the obligation of the contract contained in the mortgage.⁴⁵

Since the statute of 1880 (P. L. 1880, p. 255), a personal decree for a deficiency cannot, on foreclosure, be obtained against a mortgagor. In *Allen v. Allen*, 34 N. J. Eq. 493 (1881), it was held, however, that the grantees of mortgaged premises who assume the payment of the mortgage in their respective deeds, are, nevertheless, still liable to the mortgagee on their several assumptions, if a deficiency remain after foreclosure, and that their liability may be enforced through an independent suit in equity.

"The act of March 23, 1881, provides that, in all cases where a bond and mortgage has been given for the same debt, all proceedings to collect said debt shall be, first, to foreclose the mortgage, and if the sale of the mortgaged premises shall not produce a sum sufficient to satisfy the claim, then it shall be lawful to sue on the bond for the deficiency. The statute is comprehensive—it in terms applies to all cases. It is imperative that all proceedings to collect the debt shall be, first, to foreclose the mortgage securing it, and the further provision that it shall be lawful to proceed on the bond for the deficiency after sale of the mortgaged premises, by clear implication excludes the right to sue upon the bond before foreclosure. The interest is part of the debt due on the bond and secured by the mortgage, and the suit for it is a proceeding to collect the debt before foreclosure, in contravention of the provisions of the statute."⁴⁶ It was held, therefore, that suit on overdue interest coupons, on coupon bonds secured by mortgage on lands in this state, will not lie until after foreclosure and sale of the mortgaged premises.

The object of the act of 1881, which prohibits suit upon the bond until sale is made under the decree of foreclosure, is to compel the mortgagee to look primarily to the mortgaged premises for payment,

44—P. L. 1880, p. 255; P. L. 1881, p. 184. These statutes will be found in Part II of this book.

45—*Champion v. Hinkle*, 45 N. J. Eq. 162 (1883). See also *Coddington v. Bispham*, 36 N. J. Eq. 574 (Court of Errors & Appeals, 1883).

46—*Holmes v. Seashore Electric Railway Co.*, 57 N. J. L. 16 (1894).

and to limit the time for suing upon the bond for deficiency to six months from the date of sale.⁴⁷

"The entire scheme and purpose of the act of 1881 is to control the remedies given by law to the obligee and mortgagee, before the enactment of this new law, for the benefit of the obligor and mortgagor in every feature of the statute. This clearly appears in the third section, where the recovery on the bond, after the foreclosure of the mortgage, is made to operate as an opening of the foreclosure sale, and the time given for the redemption of the mortgaged land, to the person against whom the judgment has been recovered. It is intended to make the secondary security which binds only the mortgaged land the primary remedy, instead of the bond which reaches all the personal and real property of the obligor. It says in effect to the mortgagee, Make your money out of your mortgage; if you do not, we will put hindrances on the collection of your bond, first, by requiring you to bring your suit thereon in six months after the foreclosure sale, under penalty of losing this security; and if you bring suit on the bond the mortgagor may redeem his land to keep his other property from seizure and sale by payment of the debt he owes at the end of all legal proceedings. The time given for suit on the bond and redemption of the land are mere qualifications and incidents to the main purpose of the act, and so connected as to be inseparable."⁴⁸

The terms of the act requiring, in case of a bond and mortgage given for the same debt, that the mortgage shall be first foreclosed, are not waived by giving with the bond, a warrant to confess judgment; and a judgment entered upon such bond before the foreclosure of the accompanying mortgage is irregular. The court said, however, that "The statute is one the protection of which can probably be waived. It seems to be enacted for the benefit of individuals, and not to secure any object of public policy or morality. The right to waive a privilege conferred by a statute of this kind is undoubted."⁴⁹

And in a later case it was held that the act of 1881 does not apply where the mortgagor subsequently executes a warrant of attorney to confess judgment for the same debt with intention that judgment shall be entered at once.⁵⁰

"A reading of the act of March 23rd, 1881, whose protection is here invoked, shows that the bond and mortgage covered thereby was the well known and time honored bond and mortgage which had been from time immemorial in use in New Jersey, namely, a bond in a penal sum double the amount of the indebtedness conditioned to pay the real indebtedness at the time specified. The mortgage was an ordinary common law conveyance in fee simple with a proviso that if the money

47—*Smith v. Crater*, 43 N. J. Eq. 636 (Court of Errors & Appeals, 1887).

48—*Morris v. Carter*, 46 N. J. L. 260, 268 (1884).

49—*Hellyer v. Baldwin*, 53 N. J. L. 141 (1890); citing *Quick v. Corlies*, 39 N. J. L. 11 (1876). See also *Van Aken v. Tice*, 60 N. J. L. 377 (1897).

50—*Andrus v. Burke*, 61 N. J. Eq. 297 (1901).

secured in the bond should be paid according to the conditions thereof, then the conveyance should be void, otherwise to remain in full force and virtue. Now, it requires no argument to sustain the position that the act in question being in derogation of the common law must be construed strictly. It was so held by the late Chancellor Runyon in *Crater v. Smith*, 42 N. J. Eq. 348, and his decree in that case was affirmed by the Court of Errors and Appeals in 43 N. J. Eq. 636, and the objects of the law explained by the same learned judge who spoke for the Supreme Court in the case cited from 57 N. J. Law, 16. * * * There a party held a bond and mortgage against a decedent whose estate was insolvent, and before foreclosing his mortgage he presented a sworn claim to the administrator which was stricken out by the Orphan's Court on the strength of this statute, and was reinstated and held to be valid by both the Chancellor in the Prerogative Court and the Court of Errors and Appeals on appeal therefrom; and it was further held that the creditor having, after presenting his claim as just stated, foreclosed his mortgage and shown a deficiency on his bond, his claim previously presented should stand for such deficiency without any suit being brought on the bond and after six months had elapsed after foreclosure."⁵¹

"That a single bondholder, or several combined, holding bonds secured by a mortgage given to a trustee, may maintain such a suit in his or their own name or names, although the mortgage provides for a suit by the trustee, is well settled. The right given to the trustee to foreclose is cumulative, and not exclusive of the right of the bondholders. Their rights arise out of the fact that they are the parties beneficially interested in the mortgage security. It is primitive and fundamental in its character, and can be taken away only by some provision, express or implied, found in the instrument itself. *McFadden v. Railroad Co.*, 49 N. J. Eq. 176 (1891), where will be found an exhaustive consideration of the subject by Vice-Chancellor Green; and see (on p. 184) his extract from the opinion of Mr. Justice Matthews, speaking for the Supreme Court of the United States, in *Railroad Co. v. Fosdick*, 106 U. S. 47 (at p. 68). And see also *Johnes v. Outwater*, 55 N. J. Eq. 398 (1897).

"In the present case the trustee did not positively decline to act, but he imposed terms which, I think, the complainants, under the circumstances, were not bound to accept, and were quite justified in falling back on what I think was their primitive right."⁵²

Such suit ordinarily should be brought by the bondholder in behalf of himself and all other bondholders, but an averment to this effect is unnecessary when default has been made only on the bonds held by complainant.⁵³

⁵¹—*Pitney, V. C.*, in *Reinhardt v. Interstate Telephone Co.*, 71 N. J. Eq. 70 (1906).

⁵²—*Schultze v. Van Doren*, 64 N. J. Eq. 465 (1903); affirmed 65 N. J. Eq. 674 (Court of Errors & Appeals, 1903).

⁵³—*McFadden v. Mays Landing & Egg Harbor City R. R. Co.*, 49 N. J. Eq. 176 (1891).

But he will not be permitted to proceed without bringing in the other bondholders in some manner.⁵⁴

Bondholders are not necessary parties to a bill for foreclosure by their trustees, of the mortgage given to secure the bonds.⁵⁵

"The well-settled rule is that in a foreclosure of a mortgage held by a trustee, not only the trustee, but also the cestuis que trust should be parties to the bill. The holders of both the legal and the equitable interests in the mortgage are necessary parties. * * * The rule is elementary that the court must have before it all the parties whose rights will be in any way affected by its action, in order that all questions touching the subject matter of the suit and pertinent to the relief sought may be considered and finally determined. This rule has its exceptions, arising out of the circumstances of particular cases, which may excuse the complainant from its observance. One is the inconvenience and expense of bringing before the court all of a large number of the cestuis que trust whose interests are substantially the same and who may be represented by a trustee whose duty it is to care for their interests. The trustee mortgagee might in such case file his bill in his own name for the benefit of the cestuis que trust, and without making them parties."⁵⁶

A suit by a bondholder of a corporation to throw it into insolvency and administer its assets for the benefit of all its creditors, is not a suit to collect the debt evidenced by the bond and secured by the mortgage within the provision of the mortgage that no holder or holders of any less proportion than 25 per cent of the total amount in value of the outstanding bonds or coupons secured thereby, shall be entitled to institute any proceedings to foreclose the mortgage or to execute the trust, or for the appointment of a receiver or for any other remedy under the mortgage.⁵⁷

A suit for the foreclosure of a mortgage, given by a corporation to a trustee to secure a number of negotiable bonds issued under legislative power, is for the benefit of all the bondholders, whether the bill be filed by the trustee or by the holder of some of the bonds, making the trustee a defendant therein; and the holders of other bonds may come in and prove before the master without making themselves parties to the suit.⁵⁸

There is no such thing known to equity practice as the admission

54—*Johnes v. Outwater*, 55 N. J. Eq. 398 (1897).

55—*Williamson & Upton v. N. J. Southern Railroad Co.*, 25 N. J. Eq. 13 (1874); *Willink v. Morris Canal & Banking Co.*, 4 N. J. Eq. 377 (1843); *New Jersey Franklinite Co. v. Ames*, 12 N. J. Eq. 507 (Court of Errors & Appeals, 1859); *Camden S. D. & T. Co. v. Dialogue*, 72 Atl. 358 (Court of Errors & Appeals, 1909); *Ring v. New Auditorium Pier Co.*, 77 Atl. 1054 (1910).

56—*Johnes v. Outwater*, 55 N. J. Eq. 398 (1897); citing *Hackensack Water Co. v. DeKay*, 36 N. J. Eq. 548 (Court of Errors & Appeals, 1883).

57—*Reinhardt v. Inter-State Telephone Co.*, 71 N. J. Eq. 70 (1906).

58—*Hackensack Water Co. v. DeKay*, 36 N. J. Eq. 548 (Court of Errors & Appeals, 1883).

of a stranger as a party to a pending suit, either as complainant or defendant, unless the complainant shall consent thereto, or there be a statute within the provisions of which he may bring his application.⁵⁹

A foreclosure suit is not a proper proceeding in which to litigate the rights of a party claiming title to the mortgaged premises, in hostility to the mortgagor. Therefore, where defendants, who were permitted to intervene in a foreclosure suit upon a mortgage made by a railroad company formed by the amalgamation or consolidation, pursuant to legislative authority, of certain existing railroad companies, sought to question and litigate the validity of the consolidation, it was held, that that defence would not be entertained.⁶⁰

The ordinary duties of a receiver in a foreclosure suit are in aid of the mortgagee, by collecting the rents and preserving the property from loss and decay. In railway foreclosures, his duties, though more extensive, are primarily the same. The appointment is presumed to be for the benefit of the mortgagees, and for the protection of their interests.⁶¹

An officer selling under judicial process has a naked power to sell according to the mandate of the court. He may adopt conditions of sale amply sufficient to secure compliance by purchasers with their bids, but he cannot impose any liability upon purchasers with respect to the property sold which would not result by law from the purchase.⁶²

The act of a sheriff in adjourning a sale under foreclosure proceedings, is not a judicial act, nor in any way forbidden by "The act in relation to legal holidays."⁶³

The ordinary method of compelling a purchaser at a sale under an order of court, who has signed an acknowledgment of the purchase, to complete it, is by an order to show cause why an attachment should not issue against him as for contempt.⁶⁴

After a sale in a foreclosure suit, and the purchaser has got his deed, a writ of assistance will go *ex debito justitiæ*, to put him in possession. "This remedy is founded on the general principle that a court of equity will, when it can do so justly, carry its own decrees into full execution, without relying on the co-operation of any other tribunal."⁶⁵

A trust mortgage secured the payment of bonds and provided that no bondholder should foreclose until the trustee should, on request, have refused or for sixty days neglected to act, and contained a clause

59—Shepard v. N. J. Consolidated Water & Light Co., 73 N. J. Eq. 578 (1907).

60—Coe v. N. J. Midland Ry. Co., 31 N. J. Eq. 105 (1879).

61—Receivers of N. J. Midland Ry. Co. v. Wortendyke, 27 N. J. Eq. 658 (Court of Errors & Appeals, 1876).

62—Hackensack Water Co. v. DeKay, 36 N. J. Eq. 548 (Court of Errors & Appeals, 1883).

63—White v. Zust, 28 N. J. Eq. 107 (1877).

64—Bowne v. Ritter, 26 N. J. Eq. 456 (1875).

65—Beatty v. DeForest, 27 N. J. Eq. 482 (Court of Errors & Appeals, 1875).

that in case the trustee became incapable to act, the holder of ten thousand dollars or more of the bonds might, by a mode pointed out in the mortgage, procure the appointment of a new trustee. The trustee did become incapable. The holder of twelve thousand dollars of the bonds filed his bill as sole complainant to foreclose the mortgage, without taking the provided steps to procure a new trustee and without making parties any of the other bondholders, some of whom were known to him. A demurrer to the bill for want of a trustee and the other bondholders as parties was sustained.⁶⁶

In *Guaranty Trust Co. v. Green Cove R. R. Co.*, 139 U. S. 137, it was held that a provision in a deed of trust, to the effect that neither the whole nor any part of the premises mortgaged should be sold, under proceedings either at law or equity, for the recovery of the principal or interest of the bonds, it being the intention and agreement of the parties that the mode of sale provided by the mortgage "shall be exclusive of all others" was open to the objection of attempting to provide against a remedy in the ordinary course of judicial proceedings, and oust the jurisdiction of the courts, which, as is settled by the uniform consent of authority, cannot be done. The proceedings provided in the mortgage are, therefore, regarded as cumulative remedies.⁶⁷

Powers given, by the terms of the mortgage, to the trustee after default for a stated period in payment of interest, to take possession of the mortgaged property and sell the same, and apply the proceeds to the payment of interest and principal, do not change the construction of the mortgage, as to the time when the principal becomes due, so as to authorize a foreclosure for the principal as well as interest. On foreclosure for unpaid interest, the principal not being due, only so much of the property as may be necessary to raise the amount due should be sold, if the property is divisible without material injury to the security.⁶⁸

Where, in the usual conduct of the business of a manufacturing company the greater portion of its product must be sold outside of the state in which its plant is located, the deposit of about one-tenth of that product in a warehouse outside of the state, and the use of warehouse receipts as collateral to its commercial paper, is a part of the conduct of its ordinary business, within a provision in the company's mortgage, providing that it may "conduct its ordinary business and in so doing dispose of any of the foregoing personal property," and the mortgagee cannot have a removal of the mortgaged goods from the state for such a purpose, enjoined.⁶⁹

"In my judgment it is clear, both from principle and authority, that

66—*Johnes v. Outwater*, 55 N. J. Eq. 398 (1897).

67—*McFadden v. Mays Landing & Egg Harbor City R. R. Co.*, 49 N. J. Eq. 176 (1891).

68—*McFadden v. Mays Landing & Egg Harbor City R. R. Co.*, 49 N. J. Eq. 176 (1891).

69—*Anderson v. Anderson Food Co.*, 66 N. J. Eq. 209 (1904).

the liability imposed on and accepted by a trustee may be limited by the terms of the instrument creating the trust. If there is such a clause of limitation, the rule for measuring the trustee's liability is to be sought in that clause properly construed. In construing such a clause, the meaning to be attributed to it should be consistent with the purpose and object of the trust, and a strict rule of construction should be applied as against the claim of restriction. But if, when so construed, a limitation on the liability of the trustee was clearly intended, the trustee is entitled to the benefit of it." 70

In *Tuttle v. Gilmore*, however, it was held, where the instrument creating a trust contained a clause that, "And lastly it is understood and agreed, as a condition of the trust hereby assumed and declared, that I, the said George F. Tuttle, shall not be liable or responsible for any other cause, matter or thing, except my own wilful and intentional breaches of the trusts herein expressed and contained," that the trustee was not exempted from liability for losses arising from his having made sales or investments without instituting proper inquiries and exercising a reasonable judgment in respect to the value of the consideration or securities received, nor for losses arising from investments of trust funds in second mortgages, where no circumstances were shown to justify a resort to such hazardous securities. The fact that the trustee neither made nor intended to make any personal gain from his acts, does not exonerate him from liability under that clause.

"I think it safe to affirm that clauses of that character restrictive of the common law right of a creditor who holds a plain obligation of his debtor, are not favored by the courts, and such clauses must be strictly construed. It was so held by the Supreme Court of the United States in *Guaranty Trust Co. v. Railroad Co.*, 139 U. S. 137. At page 142 the court says: 'We think such limitations upon the power of the trustee to take legal proceedings to enforce payment of the amount secured should be strictly construed' and then farther on it says, 'It is true there is a subsequent provision in the deed of trust to the effect that 'neither the whole nor any part of the premises shall be sold under proceedings either at law or in equity for the recovery of the principal or interest of the bonds, it being the intention and agreement of the parties that the mode of sale provided by the mortgage shall be exclusive of all others.' This clause, however, is open to the objection of attempting to provide against a remedy in the ordinary course of judicial proceedings and oust the jurisdiction of the courts which, as is settled by the uniform current of authority, cannot be done." 71

If a mortgage trustee, without proper certificate, authenticate and issue bonds that by the terms of the trust are issuable only on a certificate to the trustee by the mortgagor that their amount has been ex-

70—*Tuttle v. Gilmore*, 36 N. J. Eq. 617 (Court of Errors & Appeals, 1883); see also *Babbitts v. Fidelity Trust Co.*, 72 N. J. Eq. 745 (1907).

71—*Pltney, V. C.*, in *Reinhardt v. Interstate Telephone Co.*, 71 N. J. Eq. 70 (1906).

pended on the mortgaged premises, when, in fact, such amount has not been so expended, a court of equity should decree that the trustee put the holder of such bonds in as good a position as if a certificate proper in form and true in fact had been given.⁷²

As between trustees for first mortgage bondholders of an insolvent corporation, whose debt under the mortgage under foreclosure by them is due and exceeds the whole value of the property of the corporation, and who apply to have the property delivered to them, and the receiver of said company, who applies for an order for sale of the property and franchises free from the lien of the encumbrances, the trustees were held to be entitled to the property, and to be permitted to operate the road, leaving the question as to the mode and manner of sale to be settled at the determination of those proceedings.⁷³

But in ordinary cases mortgagees, bondholders and lienors of a corporation take subject to the effect of insolvency proceedings which may subsequently be commenced, and in which a receiver may be appointed of all the corporate assets, including the property upon which the encumbrance has been so acquired.⁷⁴

A trust mortgage to secure bonds thereafter to be issued will stand as a security therefor from the date of its record, and will take precedence over subsequently accruing lien claims.

A mortgage dated July 19, 1889, delivered the same day and recorded July 22, 1889, was given by a gas company to the Central Trust Company, as trustee, to secure bonds to the amount of three hundred and fifty thousand dollars. No bonds were issued or sold until September 20, 1889. The gas company commenced the erection of a building upon the mortgaged premises July 29, 1889, before the issue of any bonds. It was held, that the holders of the mortgage bonds had a lien relating to the time when the mortgage was recorded, and that the mortgage was an encumbrance upon the mortgaged premises prior to the claims for mechanics' liens.⁷⁵

In a case in the Court of Chancery, Vice-Chancellor Grey said that under P. L. 1898, p. 550, § 28, which provides that the sale under the lien claim judgment shall pass title subject to any mortgage given under the circumstances stated in section 15, which provides that any mortgage recorded before a lien claim is filed, shall have priority to the extent of money actually advanced by the mortgagee and applied to the erection of any new building on the premises, it was held that a

72—*Polhemus v. Holland Trust Co.*, 61 N. J. Eq. 654 (Court of Errors & Appeals, 1900).

73—*Randolph v. Larned*, 27 N. J. Eq. 557 (Court of Errors & Appeals, 1876).

74—*Lembeck v. Jarvis Terminal Cold Storage Co.*, 68 N. J. Eq. 352 (1904).

75—*Central Trust Co. v. Continental Iron Works*, 51 N. J. Eq. 605 (Court of Errors & Appeals, 1893); *Central Trust Co. v. Bartlett*, 57 N. J. L. 205 (1894). But see the provisions of the Mechanic's Lien Law of 1898 (P. L. 1898, p. 538, §§ 14, 15 and 23).

mortgagee cannot claim a lien superior to a mechanic's lien without showing that the money was loaned for and actually applied to the erection of a building on the premises. And proof that the money was spent in buying furniture for a building thereon, the court held is not sufficient. "Mr. Busch insists that the receiver's above named adjudication is contrary to the rule laid down in *Central Trust Co. v. Continental Iron Works*, 51 N. J. Eq. 605, where it was held that although the owner commenced the building before the mortgage bonds were issued, yet the holders of the bonds had a lien relating to the time when the mortgage was recorded, which was prior to the commencement of the building. If that case is carefully read, it will be found that the transaction was a mortgage, expressed on its face, to secure future advances, and that it was given priority because in that case neither the trustee nor the bondholders had actual notice of the subsequent encumbrances." 76

On appeal, the court of Errors and Appeals said: "The orders of the Court of Chancery appealed from are affirmed with the remark that the observation of the learned vice-chancellor respecting the influence of sections 15 and 28 of the Mechanic's Lien act (P. L. 1898, p. 550) upon the relative priority of the mechanic's lien of the *DuParquet & Mesne Co.* and the mortgage of *C. M. Busch*, were not necessary to a decision of the question involved. Upon the soundness of these observations, no opinion is expressed." 77

82. EXTRAORDINARY RIGHTS AND POWERS OF PUBLIC SERVICE CORPORATIONS.

The rule must be considered settled, that no person or corporation can acquire a right to make a special or exceptional use of a public highway not common to all the citizens of the state, except by grant from the sovereign power.¹

The right must be given by express enactment, or if it rests upon implication, it must flow necessarily out of the law from which it is derived.²

Where the legislature has imposed conditions on all claiming such legislative authority, as it affects the interests of the public, it is the

76—*Porch v. Agnew Co.*, 70 N. J. Eq. 328 (1905).

77—*Porch v. Agnew Co.*, 71 N. J. Eq. 305 (Court of Errors & Appeals, 1906).

1—*McCarter v. Vineland Light & Power Co.*, 73 N. J. Eq. 703 (Court of Errors & Appeals, 1908); *Jersey City Gas Co. v. Dwight*, 29 N. J. Eq. 242 (1878); *State, Montgomery v. Trenton*, 36 N. J. L. 79 (1872); *Jersey City v. Jersey City & Bergen R. R. Co.*, 20 N. J. Eq. 360 (1869); *Pater-son & Passaic Horse R. R. Co. v. City of Paterson*, 24 N. J. Eq. 158 (1873); *Richards v. Dover*, 61 N. J. L. 400 (1898).

2—*State, Hoboken Land & Improvement Co. v. Mayor*, 35 N. J. L. 205 (1871).

duty of the court to apply the test imposed by the latest legislation, whether the parties plead it or not.³

"Of course, it is quite a question whether the Public Service Corporation can take a gas plant and gas franchise by lease and then use and exercise them. It is settled that a corporation under the general corporation act cannot exercise the functions of a gas company even by leave of the municipal authorities. That is settled in the case of *Richards v. Dover*, 61 N. J. Law, 400 (1898). Counsel for the complainants, the two corporations, points out a statute of the state which he claims validates this lease. This statute is entitled 'An Act Concerning Corporations' and was approved March 24th, 1899 (P. L. 1899, p. 334).

* * * The difficulty about the act as it seems to me, or the question in regard to the act is whether—when the legislature has provided, and in fact maintains on the statute book, a special statute relating to the incorporation of gas companies, imposing special limitations upon them, and providing for them a special form of government, through a very large number of directors, much larger than is required for the government of a corporation created under the general corporation act—this statute of 1899 is to be construed to enable a corporation created under the general corporation act, perhaps with three directors only, to accept by lease the franchises of a gas corporation, and then exercise these franchises and carry on the gas business. I am very glad that I do not have to consider or decide this question. I avoid it, as I feel it is my duty to do, because the decision of it is unnecessary in my judgment."⁴

It is against the policy of the state to have public franchises operated by individuals, by executors, administrators, guardians of infants or trustees in bankruptcy.⁵

In *Van Duyne v. Knox Hat Mfg. Co.*, 71 N. J. Eq. 375 (1906), it was held that a municipality is a mere trustee for the public at large and can only exercise rights vested in it over streets for the furtherance of the rights of the public, and is not authorized to grant the right to a private citizen to make a special use for private purposes of the substratum of a public highway, the fee of which is owned by another, and that hence, the municipal authorities of a borough could not lawfully grant to a private citizen or corporation the right to lay water pipes in the streets to be used for private purposes.

The right to use public streets under an ordinance is a property right.⁶

3—*Paterson Railway Co. v. Grundy*, 51 N. J. Eq. 213 (1893).

4—*Stevenson, V. C.*, in *Public Service Corporation v. DeGrote*, 70 N. J. Eq. 454 (1905).

5—*McCarter v. Vineland Light & Power Co.*, 73 N. J. Eq. 703 (Court of Errors & Appeals, 1908).

6—*United New Jersey Railroad & Canal Co. v. Jersey City*, 71 N. J. L. 80 (1904); *Cape May v. Railroad Co.*, 60 N. J. L. 224 (Court of Errors & Appeals, 1897).

No subsequent ordinance affecting such right can be passed without notice to the company.⁷

Although technically speaking franchises are property, they are property of peculiar character arising only from legislative grants and are not subject to sale and transfer without the authority of the Legislature.⁸

A franchise to maintain and operate a street railway over a public highway and to collect tolls from all persons traveling thereon is property, and as such is taxable, but, under present legislation, the right to tax it has been reserved by the state to itself, through its state board of assessors and not delegated to the several municipalities through which the company's road passes.⁹

"All the cases which have dealt with the status of street horse railroads and their successors, the electric railways, using public highways longitudinally, have been based on the theory that these uses of the highway are within those for which the land was originally taken by the public for a highway (*Hinchman v. Paterson Railroad Co.*, 17 N. J. Eq. 75; *Halsey v. Rapid Transit Co.*, 47 N. J. Eq. 380); that the movement of street railway cars on their tracks in the highway, 'is only a modification of the public use to which the highway was originally devoted.' *Citizens' Coach Co. v. Camden Horse Railroad Co.*, 33 N. J. Eq. 267. In that case it was expressly held, by the court of errors and appeals, that the legislative grant to a street railway company of the right to lay rails in a public street at the level of the highway, carried with it, in the nature of a condition imposed on the company, a permission to other vehicles to use the railway tracks as a place of passage to and fro, but not for the purpose of competing with the street railway company in carrying passengers for hire. The fact of these and similar decisions is to declare that the movement of street railway cars along the public highways is a use which the street railway companies enjoy in common with other vehicles traveling on these highways. Everyone enjoying such a common easement is bound so to regulate his own use of the common right that he does not unreasonably interfere with other persons in their enjoyment of it."¹⁰

The right rests upon contract. Thus it was held that a street railway company incorporated under the act of 1886, which, on application pursuant to P. L. 1889, p. 100, paid \$100 to a township, for a lo-

7—*United Electric Co. v. Bayonne*, 73 N. J. L. 410 (1906); see also *Jersey City, etc., Ry. Co. v. Passaic*, 68 N. J. L. 110 (1902); *Traction Co. v. Board of Works*, 56 N. J. L. 431 (1894); *Stanley v. Passaic*, 60 N. J. L. 392 (1897); *Dodd v. State Board of Health*, 67 N. J. L. 463 (1902).

8—*McCarter v. Vineland Light & Power Co.*, 73 N. J. Eq. 603 (Court of Errors & Appeals, 1908); see also *Stockton v. Central R. R. Co.*, 50 N. J. Eq. 52 (1892); *Randolph v. Larned*, 27 N. J. Eq. 557 (1876); *Black v. Delaware & Raritan Canal Co.*, 22 N. J. Eq. 130 (1871).

9—*Newark v. State Board of Taxation*, 67 N. J. L. 246 (Court of Errors & Appeals, 1902).

10—*Camden, etc., Ry. Co. v. U. S. Cast Iron, etc., Co.*, 68 N. J. Eq. 279 (1904).

cation of its tracks, and has been granted permission to lay its tracks along a certain road through the township, derives its right to be a railway company and to occupy streets with its tracks from the Legislature. The only authority given to the township is to grant or refuse a "location" for the tracks, which, when once granted, exhausts its power, and the township cannot thereafter interfere with any rights conferred by the Legislature. And an ordinance granting such location, on acceptance by the company, constitutes a valid contract, and its provisions cannot be impaired by either party without the consent of the other.¹¹

A stipulation on the part of a street railway company to keep and maintain the portion of a street inside its rails and for two feet outside of them in good and sufficient repair, does not require it to pay the cost of repaving within those limits with a new and different material selected by the city.¹²

In *Public Service Corporation v. DeGrote*,¹³ it was held that a corporation having the right under the act incorporating it to lay gas mains and conduct a lighting business in a certain township, was not deprived thereof by a later statute dividing the township into three new townships.

The legislative grant of a special franchise whether granted by special charter or under general laws, confers privileges which are necessarily exclusive in their nature as against all persons upon whom similar rights have not been conferred. Any attempted exercise of such rights without legislative sanction is not only an unwarranted usurpation of power, but operates as a direct invasion of private property rights of those upon whom the franchises have been so conferred.¹⁴

A street railway company obtains no rights in a public road or street by the construction and operation of a railway therein, under an ordinance passed *ultra vires*, as will prevent the township committee from granting permission to another railway company to construct and operate its railway in the same public road or street.¹⁵

In *Atlantic City Waterworks v. Atlantic City*, 39 N. J. Eq. 367 (1885), the complainants were incorporated, under a general statute, to supply Atlantic City, the defendant, with water. They afterwards contracted with the city for that purpose, and thereby accepted the pro-

11—*Asbury Park & S. G. Ry. Co. v. Neptune Township*, 73 N. J. Eq. 323 (1907).

12—*Dean v. Paterson*, 67 N. J. L. 199 (1901).

13—70 N. J. Eq. 454 (1905).

14—*Raritan & Delaware Bay Ry. Co. v. Delaware & Raritan Canal Co.*, 18 N. J. Eq. 546 (Court of Errors & Appeals, 1867); *Pennsylvania R. Co. v. National Ry. Co.*, 23 N. J. Eq. 441 (1873); *Jersey City Gas Co. v. Dwight*, 29 N. J. Eq. 242 (1878); *Elizabethtown Gas Co. v. Green*, 46 N. J. Eq. 118 (1889); *Millville Gas Light Co. v. Vineland Light & Power Co.*, 72 N. J. Eq. 305 (1906).

15—*Pennsylvania R. R. Co. v. Township of Hamilton*, 67 N. J. L. 477 (1902); affirmed 68 N. J. L. 414 (Court of Errors & Appeals, 1902).

visions of certain ordinances regulating the mode of supplying the water, both for public and private purposes. They received in return exemption from municipal taxation, and also the exclusive privilege of furnishing water to the city and its inhabitants. They constructed their works at a large expense, and supplied the water, as required by their contract, satisfactorily. It was held, that whether or not the city's grant of the exclusive privilege of furnishing water was *ultra vires*, and void as creating a monopoly, the city had exhausted its power as to providing a water supply; that the complainants' franchise was exclusive, and that consequently, the Court of Chancery would, by injunction, protect the complainants against any invasion of their rights by persons laying water-pipes, etc., under municipal authority, to compete with them unlawfully. The Court said:

"The franchise granted by the legislature to the company is, by necessary implication, exclusive. The purpose for which it was granted shows that it must have been intended to be so. It was bestowed for a single object—the supplying of Atlantic City with water. The requirement that the city consent to the creation of the corporation gives strength to the inference. Equity will protect a corporation entitled to the enjoyment of an exclusive franchise, against unlawful competition. So long as the company shall continue to supply the city with pure and wholesome water at reasonable rates it will be entitled to protection against unlawful competition. It is not necessary to that protection, however, to prevent the city from granting permission to others to lay pipes. The remedy is to restrain such persons, whether natural or artificial, from availing themselves of the permission, to the prejudice and injury of the complainant."¹⁶

In *Atlantic City Water Co. v. Consumers Water Co.*, 51 N. J. L. 420 (1889), it was held, however, that the Water Companies Act authorizes the formation of more than one company in a city, town or village for the purposes designated, it being the settled rule that nothing can be claimed by virtue of a public grant which is not clearly given, and that where an exclusive privilege is not granted by express words or necessary intendment, none can be presumed to exist.

In *Atlantic City Water Works Co. v. Consumers Water Co.*, 44 N. J. Eq. 427 (1888), it was held that a corporation lawfully formed under the Water Companies act acquires, on its incorporation, by force of the statute, a right to lay its pipes in the public highways, and the only control which the local authorities may exercise over it, in laying its pipes, is such as may be necessary to prevent it from doing anything which will unnecessarily obstruct or otherwise interfere with public travel. It was also held that two or more corporations may be formed under the statute of 1876 in any of the localities to which it applies, and each acquires, as it is formed, precisely the same right to make use of the public highways in conducting its business. Vice-

16—*Atlantic City Waterworks v. Atlantic City*, 39 N. J. Eq. 367 (1885).

Chancellor Van Fleet said:¹⁷ "If, therefore, it be true, as was held in *Atlantic City Water Works Co. v. Atlantic City*, 39 N. J. Eq. 367, that this statute invests the first corporation organized under it, in any city to which it applies, with an exclusive franchise, it would seem to be so clear as to be beyond all dispute, that it violates both the letter and the spirit of this constitutional prohibition. The object of the prohibition is entirely free from doubt. The purpose was to deprive the legislature of the power of creating monopolies, by requiring them to pass general laws, making the acquisition of such franchises as private corporations usually exercise, open to all, and thus creating, for the benefit of the public, a healthy competition among those who seek, by the use of franchises, to make gain and profit for themselves. This purpose is expressed in language so apt and lucid that any attempt to demonstrate it, except by simply quoting the pertinent words, is more likely to obscure than to elucidate. The pertinent words are: The legislature shall pass no local or special law granting to any corporation any exclusive franchise whatever. The legislature shall pass no special act conferring corporate powers, but they shall pass general laws under which corporations may be organized, and corporate powers of every nature obtained. There are no words in the statute under consideration which, in express terms, grant an exclusive franchise or right of any kind. The complainant's claim in that regard rests entirely on an implication, which, if made, will destroy both the complainant and the right which it claims. The courts may resort to an implication to sustain a statute, but not to destroy it. It is a principle of construction, that if an act admits of two constructions, one of which will render it unconstitutional and the other not, that construction must be adopted which will render the act valid, for it must not be presumed that the legislature intended to violate the Constitution. *Colwell v. Mays Landing Water Power Co.*, 4 C. E. Gr. 245. The court, in my judgment, is bound to declare that this statute is general, to this extent, at least, that two or more corporations may be lawfully formed under it in any of the localities to which it applies, and that each acquires, as it is formed, precisely the same right to make use of the public highways in conducting its business. It is clear, then, that the complainant has not, as against the defendant, the exclusive right which it claims."

If a company has legislative power to build a railroad on a designated street, provided the municipal authorities consent thereto, and it commences to build such railroad without municipal consent, the municipal authorities cannot grant to another company the exclusive right to build a railroad in that street, without giving to the first company notice and an opportunity to be heard. A consent to the location of the route, under section 6 of the Traction Companies act, if properly granted, secures the company an exclusive right for a limited

¹⁷—44 N. J. Eq. 427, 436 (1888).

time to build the line of railway indicated; that is, an exclusive right to the route, subject, of course, to the obtaining of municipal consent to the location of tracks thereon.¹⁸

"Since the decision in the case of *Morris & Essex Railroad Co. v. Blair*, 1 Stock. 635, 646, it would seem that no one can doubt that when one of these quasi-public corporations has filed in due manner its survey and map in the office of the secretary of state, it thereby secures the pre-emption of the property thus described."¹⁹

The consents of abutting property owners required by statute in certain cases are not grants to the railway company, but are authorizations given to the municipality as the agents of the consenting abutters and of the public to grant the permission applied for, if in the discretion of the governing body it chose to do so.²⁰

The Eminent Domain act of 1900 (P. L. 79)²¹ neither confers nor withdraws the power of eminent domain, but merely regulates the procedure in its exercise.²²

All the decisions agree in laying down these principles, that the corporation can take what the legislature has authorized it to take and nothing more; that the authority must be expressly granted or necessarily implied in the express grant, and that it must be strictly pursued.²³

The courts must determine whether the use is of a public nature. If it is, the legislative authority over the subject of eminent domain, the circumstances under which, and the extent to which it shall be exercised, cannot be supervised by judicial inquiry.²⁴

The question of necessity should be controlled by the court, and there should be satisfactory evidence of the need.²⁵

One railroad company may condemn the right to cross the lands of another company of the same character, although those lands be necessary for the railroad purposes of the latter company. In such a condemnation, all that is acquired is the privilege or easement of

18—*West Jersey Traction Co. v. Camden Horse R. R. Co.*, 53 N. J. Eq. 163 (Court of Errors & Appeals, 1895).

19—*American Trans. Co. v. N. Y., S. & W. R. R. Co.*, 59 N. J. L. 156 (Court of Errors & Appeals, 1896).

20—*Currie v. Atlantic City*, 66 N. J. L. 671 (1901); *Mercer County Traction Co. v. United N. J. R. R. & C. Co.*, 65 N. J. Eq. 574 (1903).

22—*Cowles v. Midland Tel. & Tel. Co.*, 67 N. J. L. 490 (1902). affirmed 68 N. J. L. 413 (Court of Errors & Appeals, 1902).

21—See Part II of this book.

23—*Hibernia R. R. Co. v. De Camp*, 47 N. J. L. 518 (Court of Errors & Appeals, 1885); *National Docks Ry. Co. v. United New Jersey R. R. Co.*, 52 N. J. Eq. 366 (1894); affirmed 52 N. J. Eq. 552 (Court of Errors & Appeals, 1894).

24—*Olmsted v. Proprietors of the Morris Aqueduct*, 47 N. J. L. 311 (Court of Errors & Appeals, 1885).

25—*Olmsted v. Proprietors of the Morris Aqueduct*, 46 N. J. L. 495 (1884).

crossing. The place of crossing is to be and remain in the common use of both companies for the exercise of their respective franchises.²⁶

In the exercise of the right of eminent domain, the legislature may authorize shares in corporations, and corporate franchises, to be taken for public uses upon just compensation.²⁷

"The extent of the interest acquired by a railroad corporation in lands condemned by it has been the subject of frequent discussion, and much variance of opinion has been expressed on the subject, not only generally but in our own decisions. In the case of *Taylor v. New York & Long Branch Railroad Co.*, 38 N. J. L. 28, Chief Justice Beasley says: "The fee in the land is not acquired by the company, but a mere easement in such land; the title remains in the owner, the property being made servient to the purposes of the railroad." In the case of *New Jersey Zinc & Iron Co. v. Morris Canal & Banking Co.*, 44 N. J. Eq. 404, Vice-Chancellor Van Fleet declares that "where the state invests a corporation with the sovereign prerogative of eminent domain for the purpose of enabling them to construct and operate a public highway, and take land by force of their charter, or by any other means than by grants for the purposes of such highway, it is manifest that the plain purpose of the grant to them is not to give them capacity or invest them with power to take a fee, but merely to give them power to acquire such an easement in the land as will enable them fully to accomplish the purpose for which they were created." On appeal to this court the Zinc Company Case was affirmed on the opinion of the vice-chancellor. (47 N. J. Eq. 598.) In the case of *Pennsylvania Railroad Co. v. Breckenridge*, 60 N. J. L. 583, Justice Adams, delivering the opinion of this court, declares that a grant of power to condemn lands for railroad purposes "will be construed to give merely the power to take an easement adequate to the accomplishment of the corporate design." On the other hand, in the case of *De Camp v. Hibernia Mine Railroad Co.*, 47 N. J. L. 43, Justice Depue expresses the opinion that by condemnation proceedings an estate in the land itself was vested in the company and not a mere easement therein. So, too, Chief-Justice Beasley, in the case of *New York, Susquehanna & Western Railroad Co. v. Trimmer*, 53 N. J. L. 1, fifteen years after the delivery of his opinion in the Taylor Case, changing the view expressed by him in that case, held that the interest acquired by condemnation proceedings was not a mere easement in the land but such an estate as would support an action of ejectment brought to recover possession of it. Again, in the late case of *United States Pipe Line Co. v. Delaware, Lackawanna & Western Railroad Co.*, 62 N. J. L. 254, Justice Depue, delivering the opinion of this court, reiterated the

26—*National Docks, etc., Co. v. United Companies*, 53 N. J. L. 217 (Court of Errors & Appeals, 1890).

27—*Black v. Delaware & Raritan Canal Co.*, 24 N. J. Eq. 455 (Court of Errors & Appeals, 1873).

view expressed by him in the *De Camp Case*. Notwithstanding that three of the decisions referred to are those of this court, the question presented by this appeal is not one to which the doctrine of *stare decisis* is applicable, for the reason that the expression of view as to what interest in the land was acquired by a corporation by the exercise of the power of eminent domain was, in each of these cases, entirely obiter. In the *New Jersey Zinc & Iron Company Case*, the land, which was the subject-matter of the controversy, was claimed by the canal company not by virtue of any condemnation proceedings taken for the purpose of acquiring it, but solely by adverse possession for more than twenty years. The same situation existed in the case of *Pennsylvania Railroad Co. v. Breckenridge*. In the *United States Pipe Line Company Case* the question presented was the right of the pipe line company to lay its pipe across lands held by the railroad company, not by virtue of any condemnation proceeding but by conveyance. The quantity of interest which a railroad corporation obtains in land taken by it under the power of eminent domain is that which the statute conferring the power authorizes it to acquire. The legislature may authorize the taking of a fee, or any less estate, in its discretion. (*United States Pipe Line Co. v. Delaware, Lackawanna & Western Railroad Co.*, *supra*; *Sweet v. Buffalo, etc., Railroad Co.*, 79 N. Y. 299, 300.) It is manifest, therefore, that it cannot rightly be said, on the one hand, that nothing is ever acquired by such proceedings except a mere easement in or right of way over the land condemned; nor, on the other hand, that something more than a mere easement, or right of passage over or through the land, is always acquired. For instance, in the charter of the *Morris & Essex Railroad Company*, under which the *Delaware, Lackawanna & Western Railroad Company* is operating its railroad in this state, and the provisions of which called forth the expression of opinion of Justice Depue in the *United States Pipe Line Company Case* before referred to, the declaration of the statute, in conferring the power to condemn land, is, that, upon the making of the award by the commissioners (or upon the rendition of the verdict by the jury on appeal from the award) and "upon payment of the sum so found by the commissioners or by the jury, with costs, if any, the said corporation shall be deemed to be seized and possessed in fee-simple of all such lands and real estate," etc. (P. L. of 1835, p. 28); while the power conferred by the statute involved in the decision of the case of *De Camp v. Hibernia Mine Railroad Co.*, *supra*, is as follows:

"That when any corporation formed under the provisions of this act shall take legal proceedings to acquire the right of way for its proposed railroad beneath the surface of the earth, such right of way shall not include the right to permanently use or occupy the surface of the earth immediately above such railroad, but shall be confined to a mere right to tunnel and excavate the earth for its tracks." P. L. of 1879, p. 167, sec. 3.

"It needs no argument to show that the interest acquired in land by virtue of proceedings taken under the one statute is as widely different from that acquired from proceedings taken under the other, as would be the case were the interests obtained by deed or grant from the landowner instead of by the exercise of the power of eminent domain."²⁸

And the court held that when a railroad corporation, incorporated under the general railroad law, takes land by the exercise of the power of eminent domain conferred upon it by the provisions of that act, the whole present estate in the land becomes vested in the corporation, and the former owner retains no interest therein for the protection of which he is entitled to invoke the aid of a court of equity.²⁹

Land taken by the exercise of the power of eminent domain, under the general railroad law, must be held to be unalterably limited to the land particularly described, and its area can in no case and under no circumstances be extended or enlarged by construction.³⁰

In declaring that private property shall not be taken without recompense, the constitution secures to owners, not only the possession of property, but also those rights which render possession valuable. Thus, in *Pennsylvania Railroad Co. v. Angel*, 41 N. J. Eq. 316 (Court of Errors and Appeals, 1886), it was held, that a railroad company cannot justify the maintenance of a condition of things which directly renders a dwelling house in the neighborhood unfit for a place of residence, upon the ground that the nuisance necessarily results from the convenient transaction of the company's lawful business, and such a nuisance will be prohibited by injunction.

In *Ten Eyck v. Delaware & Raritan Canal Co.*, 18 N. J. L. 200 (1841), it was held that the state cannot, even for public purposes, take away the right of individuals to the advantages of streams of water in their ordinary and natural flow, without making compensation to the owner.

In *Butterworth-Judson Co. v. Central Railroad Co.*, 72 N. J. Eq. 568 (1907), it was held that where a railroad purchased the fee of land for occupation by its tracks in the exercise of its public franchise of operating a railroad, one who had an easement of a right of way over such land, which easement was interfered with by the operation of the railroad, is entitled to compensation under the Eminent Domain Act.

Whenever the property of the owner of the fee in a highway is subjected by law to an additional servitude, it is taken, within the meaning of the constitution. The contention in all cases, therefore, is over the question whether the right thus to be acquired would be an additional servitude upon the fee, or is embraced within the public ease-

28—*Currie v. New York Transit Co.*, 66 N. J. Eq. 313 (Court of Errors & Appeals, 1903).

29—*Currie v. New York Transit Co.*, 66 N. J. Eq. 313 (Court of Errors & Appeals, 1903).

30—*National Docks Ry. Co. v. United New Jersey R. R. Co.*, 52 N. J. Eq. 366 (1894); affirmed 52 N. J. Eq. 552 (Court of Errors & Appeals, 1894).

ment, and hence grantable by the public for public use without regard to the owner of the fee. "The public easement, as interpreted in this state, is primarily a right of passage over the surface of the highway and of so using and occupying the land within it as to facilitate such passage. In this primary right are included the grading, paving, cleaning and lighting of the highway, the construction and maintenance of street railways with the apparatus proper for their use, and the maintenance of appliances conducive to the protection and convenience of travellers while using the way. Secondly, the easement covers uses which, though their relation to the right of passage is remote, or even fanciful, are so generally advantageous to the owners of the fee, the owners of abutting property, that, rather by common consent and custom than by logical deduction from the primary design, they are now recognized as legitimate. Such are the construction and maintenance of sewers, water pipes and gas pipes for the convenience of persons occupying neighboring lands. The argument to support the proposition, that the right to construct and maintain a telephone line for common public use is within this easement, is that the structures required for the exercise of the right are mere adaptations of the road to the passage of the electric current, which thus travels along the highway. But the resemblance between this use and that ordinarily enjoyed under the easement scarcely goes beneath the words by which it may be described. In reality, the electric current does not use the highway for passage, it uses the wire, and would be as well accommodated if the wire were placed in the fields or over the houses; the highway is used only as a standing place for the structures. Such a use seems to us to be so different from the primary right of passage as to be essentially distinct. Nor does it rest on the same footing as those secondary uses to which allusion has been made. Telephone lines in a street do not afford to the occupants of neighboring property such general convenience, nor have they been permitted with such common and continued acquiescence, as sanction the other uses mentioned. We therefore think that the right now under consideration is not within the public easement, and can be acquired, against the consent of the private owner of the fee, only by condemnation under the power of eminent domain." 31

In *Paterson Railway Co. v. Grundy*, 51 N. J. Eq. 213 (1893), the court said: "The special rights of the abutting owner in the streets are quasi easements of access and light and air over the land of the street fronting his property. These he cannot be deprived of without compensation being made to him. These are interests distinct from those pos-

31—*Nicoll v. Telephone Co.*, 62 N. J. L. 733 (Court of Errors & Appeals, 1899), citing *Turnpike Co. v. News Co.*, 43 N. J. L. 381 (1881); *Broome v. New York & New Jersey Telephone Co.*, 49 N. J. L. 624 (1887); *Duke v. Central New Jersey Telephone Co.*, 53 N. J. L. 341 (1891); *Marshall v. Bayonne*, 59 N. J. L. 101 (1896); *Halsey v. Rapid Transit Railway Co.*, 47 N. J. Eq. 380, 393 (1890); *Paterson Railway Co. v. Grundy*, 51 N. J. Eq. 213, 225 (1893).

essed by the general public and are rights appurtenant to the lot and the improvements thereon. It is equally well settled that when a public use, authorized by law, takes no property of the individual, but merely affects him by proximity, the necessary interference in his business or in the enjoyment of his property occasioned by such use, furnishes no basis for damages."

The placing by a licensee of a municipal corporation, on a public sidewalk, the fee of which is in an adjoining owner, of poles for furnishing light by electricity for private consumption, is a taking of such owner's land, for which he is entitled to compensation, since the legislature has not authorized municipal corporations or their licensees to erect poles on sidewalks for conducting electricity for use in private lighting, but has, by act of April 21, 1896 (P. L. 1896, p. 322), authorizing the use of the public highways for distribution of electricity, forbidden such erection without the landowner's consent.³²

The building and operation of a horse railroad in the streets of a city, under the restrictions and limitations contained in the charter, by authority of the legislature and of the city council, is a legitimate use of the highway and an exercise of the public right of travel, and not a taking of private property for public use within the provision of the constitution.³³

A street railway constructed in a highway under authority of law, with a road-bed which will admit of the free use of the highway by all other lawful means, operated by cars patterned after the style and size of cars ordinarily in use by horse railways, the motive power of which is electricity supplied by means of overhead wires supported by poles planted in the sidewalks, immediately within the curbs, is but a modification of the public use to which the highway was originally devoted, and is not an additional burden on the land for which compensation may be required.³⁴

The Traction Companies Act of 1893 (P. L., p. 241), empowered city authorities, by ordinance, to authorize street railroad companies to substitute electric motors in the place of horses, as the propelling power of their cars, and to authorize the use of poles in the streets, with wires thereon to supply the motors with electricity, and to prescribe the places in which such poles should be located. The act did not confer on the companies any rights beyond those vested in them by their charters, except in allowing a change in the motor power to be applied to their cars. It was held that such an ordinance did not, per se. create an additional easement. "The act did not confer on the companies the right to acquire private property by the exercise of the right of eminent

32—*Andreas v. Gas & Electric Co.*, 61 N. J. Eq. 69 (1900).

33—*Hinchman v. Paterson Horse Railroad Co.*, 17 N. J. Eq. 75 (1864); *Citizens' Coal Co. v. Camden Horse R. R. Co.*, 33 N. J. Eq. 267 (Court of Errors & Appeals, 1880); *West Jersey R. R. Co. v. Cape May, etc., R. R. Co.*, 34 N. J. Eq. 164 (1881).

34—*West Jersey R. R. Co. v. Camden, etc., Ry. Co.*, 52 N. J. Eq. 31 (1893).

domain, but only the right to erect poles and use the trolley system, so far as the public easement was concerned, with a view to the public convenience in the use of the street, leaving the several companies, if their necessities or convenience require the appropriation of private property, to obtain the consent of the landowners by agreement." ³⁵

It is also held that a trolley railway, upon a country highway, is not an additional servitude upon the land of the abutting owner who owns to the middle of the road.³⁶

"It has been settled in this state, by decisions in all the courts, that a street railway is but a variance in the mode of using a highway (*Hinchman v. Paterson Horse Railway Co.*, 2 C. E. Gr. 75; *Halsey v. Rapid Transit Company*, 2 Dick. Ch. Rep. 380), and that the introduction of the trolley system on city streets is not an invasion of private rights. (*Kennelly v. Jersey City*, 57 N. J. L. 293 [Court of Errors]; *Roebbling v. Trenton Railway Co.*, 58 N. J. L. 667.) So long as the defendant company confines its action to the building of its road on the highway within the lines laid down for it in the city ordinances, and to the running of its cars thereon in accordance therewith, the complainants and other abutting owners whose teams are impeded in turning from their carriage entrances into the street, or whose passage along the street is delayed by the frequent running of the cars, have no special rights against the user of the highways. The court of errors, in the *Roebbling Case*, declared that there is no remedy for the abutting owner for annoyances and interferences resulting from a user which is consistent with the legitimate and proper use to which these public thoroughfares are devoted." ³⁷

"I think it must be conceded that before a corporation, authorized to condemn lands necessary for its purpose, can proceed to acquire such land by condemnation, it should determine that the necessity exists. How such determination should be expressed cannot be a matter of importance to the landowner, who may always raise the question of the actual existence of the required necessity." It was held, therefore, that where the directors discussed and agreed on a plan for making use of certain waters, which plan required the acquisition of certain lands and rights, and have purchased and paid for some of such lands, they have sufficiently determined that it is necessary to acquire the other lands essential to the plan, although they have passed no resolution to that effect; and that where, afterwards, the president made unsuccessful efforts to purchase some of said lands and had reported his failure to the directors, it seems that he acquired implied authority from the directors to institute proceedings to condemn, but if not, the subsequent

35—*Roebbling v. Trenton Pass. Ry. Co.*, 58 N. J. L. 666 (Court of Errors & Appeals, 1896).

36—*Ehret v. Camden & Trenton Railroad Co.*, 61 N. J. Eq. 171 (1900).

37—*Budd v. Camden Horse Railroad Co.*, 61 N. J. Eq. 543 (1901); affirmed 63 N. J. Eq. 804 (Court of Errors & Appeals, 1902).

approval and adoption by the directors of such proceedings instituted by him will sustain an order made thereon.³⁸

In proceedings brought to condemn lands within the filed route of a traction railway company, under and pursuant to the Traction Companies act of 1893, a conveyance of the lands by the owner, at any time after the application is made and notice given to the owner as directed by the order of the justice, will not defeat the proceedings or require notice to be given thereof to the grantee.³⁹

When a railroad corporation attempts to acquire land by the exercise of the power of eminent domain, compensation, either actual or constructive, must precede appropriation. A railroad corporation, incorporated under the general railroad law, can, in no case where payment into court must precede appropriation, acquire a right to take possession of the land condemned until it has paid the condemnation money into court in such manner that the court acquires, the instant that the payment is made, complete control over the money for all purposes. Payment to the clerk of the court in such a case, in the absence of an order or rule, is not a payment into court. The clerk has no authority to receive money for the court without a rule.⁴⁰

A railroad company acquiring land by condemnation, and paying the award of the commissioners into court, is entitled to have all liens on the land, including liens for taxes, paid out of such fund, though the lienors are not parties to the proceedings.⁴¹

In ascertaining what is just compensation for lands taken under right of eminent domain, the rule is that if the whole property be taken the market value of the property, as between an owner willing to sell and purchaser desiring to buy, is the measure of compensation. If part only is taken the problem is the difference between the market value of the property before it was taken or interfered with and the market value that remains in the property after the injury is done.⁴²

"A long line of cases in this court and one in the Supreme Court of this state and numerous others in other states of the union, collected and cited by counsel for the complainant, hold, with entire unanimity that except where the railroad company entered in the first place as a willful trespasser, or where it has been guilty of some inequitable conduct sufficient to raise a counter equity, the value of the land without the additions and superstructures is the proper measure of compensa-

38—Kountze v. Morris Aqueduct, 58 N. J. L. 303 (1895).

39—Houston v. Traction Co., 69 N. J. L. 168 (1903).

40—National Docks Ry. Co. v. United New Jersey R. R. Co., 52 N. J. Eq. 366 (1894); affirmed 52 N. J. Eq. 552 (Court of Errors & Appeals, 1894).

41—In re Sleeper, 62 N. J. Eq. 67 (1901); Platt v. Bright, 31 N. J. Eq. 81 (1879); affirmed 42 N. J. Eq. 362 (Court of Errors & Appeals, 1880); Gray v. Case, 51 N. J. Eq. 426 (1893); Burnet v. Dean, 60 N. J. Eq. 9 (1900); affirmed 63 N. J. Eq. 253, 49 Atl. 503 (Court of Errors & Appeals, 1901).

42—Butler Rubber Co. v. Newark, 61 N. J. L. 32 (1897).

tion in a case like the present. Such was the expressed declaration, after full consideration, of our court of errors and appeals in *North Hudson County Railroad Co. v. Booraem*, 28 N. J. Eq. 450.

"The foundation of the rule in equity is its intrinsic justice. This appears from an examination of the cases cited.

"Justice Depue, in the *Booraem Case*, *supra* (at p. 455), says: 'But where the company has taken possession by the consent of the owner, and has expended money in the adaptation of the land to the proposed use, and altered and changed its condition, this rule (referring to the fixed rule at law) manifestly is not adapted to reach the just compensation contemplated by the constitutional provision.' Then, after showing that it might be unjust to the landowner to compel him to take the value of the land at the time of the appraisal, because it might have been injured in value by reason of the change made by the railroad company, he proceeds: 'On the other hand, to compel the corporation to pay, as the value of the land, an increased price because of the improvements made by it, would be unjust to it. The owner has no claim in justice to have expenditures for such purposes enure to his benefit. Under such circumstances he is entitled to be paid the damages he has sustained, and nothing more. That will be represented by the value of the land as it was before it was changed in its condition, irrespective of the structure put upon it by the corporation, and interest from that time. Neither in law nor in equity is the owner entitled to anything more.' The learned judge then proceeds to cite cases in support of that proposition. This rule had been previously applied in the case of *Trenton Water Co. v. Chambers*, 9 N. J. Eq. 471; *S. C.* 13 N. J. Eq. 199. Confessedly, the same rule was adopted at law in *Coster v. New Jersey Railroad & Transportation Co.*, 23 N. J. Law, 227, and 24 N. J. Law, 730. And it was only by what was held by the law court to be the stress of the statute regulating condemnation proceedings that any other rule was adopted at law, for in *Leeds v. Camden & Atlantic Railroad Co.*, 53 N. J. Law, 229, the learned judge, who spoke for the court of errors and appeals, closed his opinion as follows:

" 'The equitable rule, which appears to have been followed in the present case, is that when prepayment has been waived the landowner retains an equitable lien upon the land for the payment of such damages as he has sustained, when the company violates the conditions upon which the entry without compensation was permitted, which may be enforced in a court of equity.

" 'The value of the land and damages at the time the entry was made, and interest from that time, have been fixed as a proper measure of damages in some such cases. See *North Hudson County Railroad Co. v. Booraem*, 28 N. J. Eq. 450, and later cases that have followed it.

" 'When parties are before that court seeking the adjustment of equitable claims for and against the railroad company, all the rights of the landowner will be protected, and full compensation may be made, not only for the value of the land taken and the damages incident to the

taking, but also for the breach of any agreement made with him, and allowance for the occupancy of the land under such agreement or by consent or license. When the company proceeds to condemn lands, under its charter, it can act only according to the exact terms of the power therein conferred. There was error in the ruling and the judgment will be reversed.'

"The question in *Leeds v. Camden & Atlantic Railroad Co.*, supra, was whether the land should be appraised as of the date when taken or as of the date of the appraisal, and it was held that the statute required it to be taken as of the date of the appraisal.

"A careful reading of the opinion does not lead me to the conclusion that the court intended to decide that the value of the railroad structure should be added to the value of the land.

"However that may be, in the case which followed it in the Supreme Court, namely, *Trimmer v. Pennsylvania, Poughkeepsie & Boston Railroad Co.*, 55 N. J. Law, 46, the learned judge who spoke for the Supreme Court seems to have so treated it and states that there is an apparent inconsistency between the *Leeds Case* and the *Booraem Case*, and reconciles them as follows: 'The difference, however, arises from a distinction taken in the later case between a proceeding to condemn, considered as a purely legal proceeding, and a proceeding in an equitable suit to ascertain the damages which the landowner has sustained by reason of the appropriation of his land. In equity, when a corporation having power to condemn has been let into possession by the landowner and makes improvements, the court will adjust the claims of the landowner upon the basis laid down in the *Booraem Case*. The court will, by means of a reference to a master, ascertain the damages to the landowner according to this standard of compensation. In the *Booraem Case* the award of the commissioners, although made upon an erroneous legal principle, was in conformity with the equitable rule, and so was permitted to stand in place of a report of a master to whom a reference might have been made. If the question of compensation had not been drawn into a court of equity by the foreclosure of a mortgage covering the land condemned in addition to other land, the rule adopted by the commissioners in that case would have been inaccurate.

"The result of these conflicting rules seems to be that if a corporation, under the conditions mentioned, takes proceedings to condemn lands, the legal rule applies; but if the question of the value of the land becomes involved in a suit in equity, the equitable rule applies. So if, under these conditions, the owner brings an action of ejectment to dispossess the company, a court of equity will stay the action upon payment of damages to be ascertained in conformity with the equitable rule. *Trenton Water Co. v. Chambers*, 9 N. J. Eq. 471; S. C. 13 N. J. Eq. 199.'

"The question, after all, was not involved in the *Trimmer Case*, since the case disclosed no privity, by way of succession or otherwise, between the railroad company prosecuting the proceedings before the

court and that which had built the works upon the ground included in the condemnation proceedings." ⁴³

Where a public service corporation takes possession with the consent or acquiescence of the landowner under an express or implied agreement for compensation, or in cases where the landowner appeals to the equity power for affirmative relief, terms may be imposed upon him that would require him to submit to condemnation proceedings, or even to abide by the determination of the Court of Equity with respect to the amount of compensation.⁴⁴

Injunction is the proper remedy to restrain a railroad company from taking the complainants' property without compensation, not because an injunction will issue to restrain an ordinary trespass, but to protect the property owner's constitutional right against aggression. But such an injunction will not issue unless the corporation is wilfully proceeding in violation of the owner's constitutional right. Thus, where the railroad, under the belief that a satisfactory arrangement would be reached for the taking of complainants land for a tunnel, delayed condemnation proceedings and prosecuted the work up to complainant's property line before he made complaint to any court, and the railroad proposed to tunnel through solid rock in complainant's land fifty feet below the surface without affecting the enjoyment of complainant's building, and without any intent to evade its duty to pay complainant compensation which it stood ready, willing and able to do, it was held that though the defendant was a trespasser in taking complainant's land without first making compensation, an injunction restraining defendant's construction would be refused on condition that defendant pay a satisfactory sum into court to guarantee complainant just compensation and diligently prosecute condemnation proceedings.⁴⁵

As to the practice on injunction where a railroad company occupies land without making compensation to the owner, see *Butterworth Judson Co. v. Central Railroad Co.*, 72 N. J. Eq. 568 (1907); *Hart v. Leonard*, 42 N. J. Eq. 416 (Court of Errors and Appeals, 1886).

In *Northeastern Telephone & Telegraph Co. v. Hepburn*, 73 N. J. Eq. 657, the Court of Errors and Appeals held that where a telephone company violates the property rights of owners of land by going thereon and constructing telephone lines without any right whatever, an injunction restraining the property owner from interfering with the construction of the lines, will not be continued until compensation to such

⁴³—*Pitney, V. C.*, in *Baltimore & New York Railroad Co. v. Bouvier*, 70 N. J. Eq. 158 (1906).

⁴⁴—*Northeastern Telephone & Telegraph Co. v. Hepburn*, 73 N. J. Eq. 657 (Court of Errors & Appeals, 1908); *Paterson v. Kamlah*, 42 N. J. Eq. 93 (1886); affirmed 47 N. J. Eq. 331 (Court of Errors & Appeals, 1890); *Sparks Mfg. Co. v. Newton*, 57 N. J. Eq. 367 (1898); affirmed 60 N. J. Eq. 399 (Court of Errors & Appeals, 1900); *Simmons v. Paterson*, 60 N. J. Eq. 385 (1900).

⁴⁵—*Menge v. Morris & Essex R. R. Co.*, 73 N. J. Eq. 177 (1907); *Nelson v. N. J. Short Line R. R. Co.*, 73 N. J. Eq. 187 (1907).

owner may be ascertained and made by the telephone company in the absence of laches or acquiescence on the part of the property owners.

83. SPECIAL DUTIES OF PUBLIC SERVICE CORPORATIONS.

"Corporate bodies that engage in a public or quasi public occupation are created by the state upon the hypothesis that they will be a public benefit. They enjoy privileges that individuals cannot have. Perpetual or certain life is accorded to them. Usually the authority of the right of eminent domain is delegated to them, often to be exercised in whatever locality they may be pleased to designate. The use of the common highway is frequently subordinated to their operations, and, indeed, the individual is compelled, even in his own home, to submit without redress to discomforts incident to their lawful operation which he would not be required to tolerate from other sources. Thus they are given special privileges because of the benefits they are presumed to confer upon communities. * * * While the state confers special privileges upon these favorites, it at the same time exacts from them duties which also tend to the public welfare. The whole scheme of the laws of their organization is to equip and control them as instruments for the public good. Such corporations hold their powers not merely in trust for the pecuniary profit of their stockholders, but also in trust for the public weal. The impress for public good is stamped upon their very being, and it becomes a duty which, though not prescribed in express language of the law, is to be implied from the nature of every power conferred." ¹

The policy of uniform legislation must be adhered to, and public corporations should be amenable to a fixed code of laws regulating and controlling the operation and defining the duties and obligations of their officers and agents in the interest of the public.²

Where a public duty is imposed upon a corporation by its charter it cannot relieve itself of that duty by leasing its property and franchises under a general legislative authority to lease. Thus where by its charter a canal company was required to make good and sufficient bridges across its canal and keep the same in repair so as to prevent any inconvenience in the use of the road by reason of the canal crossing the same; the canal company cannot relieve itself of that duty by leasing its canal, with all its boats, property, works, appurtenances and franchises to a railroad company.³

"A street railway company incorporated under the laws of this state, and the route of its road and the location of its tracks established by an ordinance of the municipality, in the streets of which the company is to operate its road, such ordinance being accepted by such company and its tracks laid in accordance therewith, and the road constructed

1—Stockton v. Central R. R. Co., 50 N. J. Eq. 52 (1892).

2—McCarter v. Vineland Light & Power Co., 73 N. J. Eq. 703 (Court of Errors & Appeals, 1908).

3—Ryerson v. Morris Canal & Banking Co., 71 N. J. L. 381 (1904).

and in operation, cannot at its mere will and discretion cease and abandon the operation thereof or any portion thereof. It becomes the duty of the railway company in the exercise of its rights, privileges and franchises for the benefit of the public, to maintain and operate its road according to the terms of the ordinance, and in compliance with statutes which confer upon the company such rights, privileges and franchises. An implied condition attaches itself to the grant of the franchise, that it be held for public benefit, and the duty upon the railway company is to exercise it for such purpose, and as a public agent it cannot escape this duty.”⁴

“As to the validity of any contract made by a railroad company for such a private use of or interest in its lands used for its railway or any of its appurtenances as would prevent its performance of these public obligations, to arrange for the public safety by the removal of grade crossings in cities, my view would be either that the contracts are altogether void or that they must be considered as made and taken subject to any contract subsequently made to remove its grade crossings. Contracts of this character, for the permanent location or use of their road or works, have been held to be subject to termination when even the interest of the road itself requires it. ‘Railroad companies, while private corporations, are quasi public agencies, engaged in the performance of public duties, and contracts which prevent them from the discharge of these duties cannot be sustained.’ *E. & S., etc., Railway Co. v. McDevitt*, 24 Sup. Ct. Rep. 36 (U. S. Supreme Court, October Term, 1903). This case was an action at law for damages for breach of a contract made on securing the right of way to operate an extension of the railroad over a particular track, and it was held that damages could not be based on the company’s obligation to continue permanent use under the contract. But the precise question here is narrower, and is this: Should the contract be specifically enforced in equity, or should the party, if the contract be a valid contract, be left to his remedy at law? This was the course directed in *Society, etc., for Establishing Useful Manufactures v. Butler*, 1 Beas. 498 (Errors and Appeals, 1859), where the court refused to specifically enforce an agreement for the supply of water upon the ground that the company was incorporated for quasi public purposes and to supply water to a community, and that, inasmuch as the performance of the company’s contract with complainant would prevent its furnishing water regularly to a large number of its lessees, the contract should not be specifically enforced but the complainant should be left to his remedy at law.”⁵

“It is familiar law that a railway company, having the right to lay tracks in a public street, is bound by the general principles of the common law, and without either a specific statute or ordinance or a contractual obligation, to lay its tracks in a proper manner, and to keep them in a proper state of repair. But the question of the liability of

4—*Bridgeton v. Traction Co.*, 62 N. J. L. 592 (1899).

5—*Swift v. Delaware, L. & W. R. R. Co.*, 66 N. J. Eq. 34 (1904).

such a company for failing to keep the surface of a street in repair is quite a different question. Such a liability does not result from the mere fact that the corporation has been vested with a franchise or license of using the public street. The liability to maintain the pavement as such, if it exists, must either be rested upon some valid statute or ordinance imposing such a duty, or must arise out of the obligations of a contract. It has been repeatedly held that where some burden has been lawfully imposed by a municipality upon a street railway company as a condition of the grant of its franchise, the acceptance of such a condition by the company constitutes a contract between the company and the municipality."⁶

Where a canal company digs or cuts a canal across a highway so as to render a bridge necessary where none was required before, the company is bound to erect and maintain such bridge at its own expense, without any express provision in its charter to that effect, and the duty is so clear, that a mandamus may issue to compel its performance.⁷

Express statutory limitation of the speed at which street railway cars may be driven along the public highways is not necessary in order to cast upon street railway companies the obligation so to restrain the speed of their cars that other vehicles may reasonably enjoy the use of the public way. The rules regulating the speed at which steam railroad companies may drive their trains have no application to street railways. Each steam railway has the sole and exclusive enjoyment of its way, and its crossings of public ways are controlled by express legislative enactments.⁸

Speaking of the duties of a public service company, the Court of Errors and Appeals said: "In accepting such a charter the company impliedly engages on its part to use it in such manner as will accomplish the object for which the legislature designed it. It cannot refuse to perform the public duties thus cast upon it, without surrendering the franchise. When an individual or a corporation is guilty of a breach of public duty by misfeasance or nonfeasance, the law provides a remedy. The true criterion by which to judge of the character of the use is, whether the public may enjoy it of right, or by permission only.

"Assuming, as we must, that the legislature intended to exercise its lawful power, and that the company, in invoking the benefit of the incorporating act, took upon itself the correlative obligation to serve the

6—*Fielders v. North Jersey St. Ry. Co.*, 68 N. J. L. 343 (Court of Errors & Appeals, 1902). See also *Wilbur v. Trenton Passenger Railway Co.*, 57 N. J. L. 212 (1894); *Railroad Co. v. Cape May*, 58 N. J. L. 565 (1896); *Cape May v. Transportation Co.*, 64 N. J. L. 80 (1899); *Dean v. City of Paterson*, 67 N. J. L. 199 (1901).

7—*Hornblower, C. J.*, In re *The Trenton Water Power Company*, 20 N. J. L. 659 (1846).

8—*Camden, etc., Ry. Co. v. U. S. Cast Iron, etc., Co.*, 68 N. J. Eq. 279 (1904); *Pennsylvania Railroad Co. v. Matthews*, 36 N. J. Law, 531 (Court of Errors & Appeals, 1873); *New York, etc., Railroad Co. v. Leaman*, 54 N. J. Law, 202 (Court of Errors & Appeals, 1891).

public, it necessarily follows that the use is a public one. I agree with Mr. Justice Parker, who delivered the opinion in the court below, that if the supplying of a city or town with water is not a public purpose, it is difficult to conceive of any enterprise entrusted to a private corporation which could be classed under that head. The supplement of 1880 to the act concerning telegraph companies contains no express words imposing the duty to send messages for all who apply. In *Turnpike Company v. News Company*, 43 N. J. L. 381 (1881), the Supreme Court maintained the constitutionality of the law as constituting a public use, on the ground that there must be an implication that in granting the franchise, the legislature intended to charge the companies with a duty to the public, and that in accepting the benefits of the law the recipient of them assumes the performance of such public duty.

"The case of *Paterson Gas Light Company v. Brady*, 27 N. J. L. 245 (1858), is cited in support of the contrary contention. In that case Mr. Justice Elmer decided that the company was under no legal obligation to supply gas to all persons having buildings on the lines of their pipes, upon tender of reasonable compensation. He rested this view upon the absence of any express provision in the charter imposing such duty upon the company. This decision fails, however, to give due effect to the purpose of the legislature in creating the company, and to the implied obligation assumed by the company in accepting the grant. If it were a grant for mere private uses, empowering the corporate body to withhold service at pleasure from all persons, the company would be without the right to occupy the public streets for the laying of its pipes, and of course the grant of eminent domain for such private purposes would be void. In this respect, in my judgment, the conclusion in the *Paterson Case* was erroneous, and in conflict with the views expressed in the *Tide Water Case* (3 C. E. Green, 518), and in *National Docks v. Central Railroad Company* (5 Stew. Eq. 755, 764)."⁹

And in *Borough of Washington v. Washington Water Co.*, 70 N. J. Eq. 254 (1905), it was held that where a water company was the sole source of water supply for a borough, it was bound to supply water to the borough at a reasonable price "and the borough on the other hand, is bound to pay a reasonable sum. * * * The public duty of the officials controlling each of the parties is to agree on a reasonable price for this public service, but if they fail to agree on any price, the reasonable price must be fixed by a competent tribunal. The claim for water heretofore supplied is altogether legal in its nature, and an action brought solely for the purpose of recovering a reasonable sum for past services, or of determining what is such reasonable sum is not within the equity jurisdiction. But such jurisdiction exists to maintain the status quo and require the continuance of the supply pending the settlement of the reasonable price for past supply. If the water company demand an

⁹—*Olmstead v. Proprietors of the Morris Aqueduct*, 47 N. J. L. 311 (Court of Errors & Appeals, 1885).

unreasonable price and threaten to cut off the public supply unless this unreasonable price is paid, the municipality has the right to enjoin the company from cutting off the supply because of failure to pay such sum. Ordinarily, the scope of the decree in such equity suit would be the determination of whether the price demanded was unreasonable, and if so found, then to enjoin the cutting off of the supply for its non-payment. The equitable jurisdiction in such suit would not extend to fixing either the reasonable sum to be paid for the past supply or for the future. Such being the scope of the final decree, the complainant, if it can show on application for preliminary injunction a fair case for trial on final hearing of the unreasonableness of the price demanded, is, under proper conditions entitled to a continuance of the supply pending hearing."

In *Public Service Corporation v. American Lighting Co.*, 67 N. J. Eq. 122 (1904), it was held that a corporation enjoying a gas franchise, and the complete or partial monopoly resulting therefrom, is bound to serve the public upon reasonable terms and at reasonable rates and that where a gas company, having a franchise and virtual monopoly, demands of a city an unreasonable price for gas, the city may offer a reasonable price; and, if the gas company refuses to furnish gas at that price, the city may obtain a mandamus, if the supply has not been commenced, or may sue in equity to enjoin the stoppage of a supply being furnished.

In *Turnpike Co. v. News Co.*, 43 N. J. L. 381 (1881), the Court said, speaking of a telegraph company, that "These provisions of the law, in connection with the fact that the legislature has granted the right to take private property, clearly evince a legislative intent to lay such companies under an obligation to the public to permit the use of their lines by all persons, under reasonable regulations; and in accepting the benefits of this law, the recipient of them assumes the performance of this duty to the public."

Where one corporation seeks judicial redress against another corporation on the ground that the other has refused to give a service, or to perform a duty which it owes, the complaining corporation, to succeed, must show, affirmatively, that the service or duty which it claims exists by force of a statute, or a contract, or a usage having the force of law.¹⁰

A contract between a railroad company operating a railroad in this state under acts of the legislature of this state, and certain individuals, the effect of which is to give the latter the exclusive right of transporting certain kinds of freight over their railroad, is void from considerations of public policy.¹¹

"Railway companies have delegated to them as part of their franchises much of the sovereign power of the state, in consideration of

10—*Delaware, etc., R. R. Co. v. Central Stockyard Co.*, 45 N. J. Eq. 50 (1889); affirmed 46 N. J. Eq. 280 (Court of Errors & Appeals, 1889).

11—*Union Locomotive & Express Co. v. Erie Railway Co.*, 37 N. J. L. 23 (1874).

their discharging part of what are the proper duties of government, that is providing the means of commerce and intercourse by constructing the roads which are the avenues of that commerce. And when being authorized they assume to operate these roads, they have devolved upon them, in consideration of that franchise the additional duty, which is not one of the proper functions of the government, of common carriers, and are obliged to transport all merchandise and passengers, on the terms fixed in the grant through which they obtain their franchises." ¹²

"The defendants are common carriers, and not only so in the light of the common law, but like all railroad corporations they occupy a peculiar relation to the public as invested with certain franchises for the public benefit, and are bound to use them with fairness and for the common good. Apart from that, however, it is clear that the business of the company must be conducted subject to the law governing common carriers generally, and to that test this contract must first be put. In the language of the books, a common carrier exercises a public employment, and Bacon in his Abridgement, calls it a public institution. (1 Bacon (B) 556.)

"The duties and liabilities are those imposed by public law, and in that respect the common carrier differs from the private. Bacon also says that common carriers 'are chargeable on the general custom of the realm for their faults and miscarriages.' 1 Bacon (A) 553. Is there anything, then, in the nature of this occupation that necessarily prevents a discrimination in rates such as this contract provides? The contract is that one customer shall be charged less than others, and, as a consequence, that other shall be charged more than that one. Such inequality operates directly upon the course of trade and creates monopolies. Most of the evils of special and unequal rates have arisen since the introduction of railways. * * *

"The business of the common carrier is for the public, and it is his duty to serve the public indifferently. He is entitled to a reasonable compensation, but on payment of that he is bound to carry for whoever will employ him, to the extent of his ability. A private carrier can make what contract he pleases. The public have no interest in that, but a service for the public necessarily implies equal treatment in its performance, when the right to the service is common. Because the institution, so to speak, is public, every member of the community stands on an equality as to the right to its benefit, and, therefore, the carrier cannot discriminate between individuals for whom he will render the service. In the very nature, then, of his duty and of the public right, his conduct should be equal and just to all. So, also, there is involved in the *reasonableness* of his compensation the same principle. A want of uniformity in price for the same kind of service under like circumstances is most unreasonable and unjust,

¹²—Rogers Locomotive & Machine Works v. Erie Railway Co., 20 N. J. Eq. 379 (1869).

when the right to demand it is common. It would be strange if, when the object of the employment is the public benefit, and the law allows no discrimination as to individual customers, but requires all to be accommodated alike as individuals, and for a reasonable rate that by the indirect means of unequal prices some could lawfully get the advantage of the accommodation and others not. A direct refusal to carry for a reasonable rate would involve the carrier in damages, and a refusal, in effect, could be accomplished by unfair and unequal charges, or if not to that extent, the public right to the convenience and usefulness of the means of carriage could be greatly impaired. Besides, the injury is not only to the individual affected, but it reaches out, disturbing trade most seriously. Competition in trade is encouraged by the law, and to allow any one to use means, established and intended for the public good, to promote unfair advantages amongst the people and foster monopolies, is against public policy, and should not be permitted. * * *

"It must not be inferred that a common carrier, in adjusting his price, cannot regard the peculiar circumstances of the particular transportation. Many considerations may properly enter into the agreement for carriage or the establishment of rates, such as the quantity carried, its nature, risks, the expense of carriage at different periods of time, and the like; but he has no right to give an exclusive advantage or preference, in that respect, to some over others, for carriage, in the course of his business. For a like service, the public are entitled to a like price. There may be isolated exceptions to this rule, where the interests of the immediate parties is alone involved, and not the rest of the public, but the rule must be applied whenever the service of the carrier is sought or agreed for in the range of business or trade. This contract being clearly within it, and odious to the law in the respect on which a recovery is sought, cannot be sustained. But there is an additional ground upon which it is also objectionable. I entirely agree with the Chief Justice that, in the grant of a franchise of building and using a public railway, that there is an implied condition that it is held as a quasi public trust, for the benefit of all the public, and that the company possessed of the grant must exercise a perfect impartiality to all who seek the benefit of the trust. It is true that these railroad corporations are private, and in the nature of their business, are subject to, and bound by the doctrine of common carriers, yet, beyond that, and in a peculiar sense, they are entrusted with certain functions of the government, in order to afford the public necessary means of transportation. The bestowment of these franchises is justified only on the ground of the public good, and they must be held and enjoyed for that end. This public good is common, and unequal and unjust favors are entirely inconsistent with the common right. So far as their duty to serve the public is concerned, they are not only common carriers, but public agents, and in their very constitution and relation to the public, there is necessarily implied a duty

on their part, and a right in the public, to have fair treatment and immunity from unjust discrimination. The right of the public is equal in every citizen, and the trust must be performed so as to secure and protect it.

"Every trust should be administered so as to afford to the *cestui que trust* the enjoyment of the use intended, and these railroad trustees must be held in their relation to the public, to such a course of dealing as will insure to every member of the community the equal enjoyment of the means of transportation provided, subject, of course, to their reasonable ability to perform the trust. In no other way can trade and commercial interchange be left free from unjust interference. On this latter ground, that part of the contract in question is illegal."

The contract in question provided that in consideration that the plaintiffs were large shippers over defendant's lines, the defendant agreed to transport livestock at the regular rates, subject to a certain drawback, and that if the defendant transported livestock for others for less than the regular rates or allowed a drawback from said rates to any others, that it would allow such further drawbacks to the plaintiffs as would reduce the cost of shipment to ten cents per hundred pounds less than that of any other person or persons, except the persons named. The action was for breach of such contract.¹³

The sale of a ticket to a railroad passenger is an undertaking that due care for his safety shall be used during the whole course of his journey over that and other roads, both in the management of the trains and the construction and maintenance of the lines in a condition fit for his passage over them. This liability is not changed by leases and agreements between the companies having connecting lines, apportioning the charges, expenses and fares between them, of which the passenger had no notice.¹⁴

84. STATE AND MUNICIPAL CONTROL OF CORPORATIONS.

The legislature, representing the state, has paramount authority over its public ways, including the streets in cities as well as the county roads, and the legislature can at any time resume the power previously granted to municipal subdivisions of the state.¹

In *Chosen Freeholders of Hudson County v. The State*, 24 N. J. L. 718 (Court of Errors and Appeals, 1853), it was held, that conferring on a board of freeholders, or other body, the power to fix rates of ferriage is not a delegation of the legislative power, vested by the constitution in the legislature.

The construction and operation of a street railway in public streets, rests finally on the legislative authority, and both construction and

13—*Messenger et al. v. Pennsylvania R. R. Co.*, 37 N. J. L. 531 (1874) Court of Errors & Appeals, Bedle, J.

14—*Little v. Dusenberry*, 46 N. J. L. 614 (Court of Errors & Appeals, 1884).

1—*United R. R. & Canal Co. v. Jersey City*, 71 N. J. L. 80 (1904).

operation are under legislative, not municipal authority. The provision for the municipal consent is a condition fixed by the legislature, and whether the condition is one which renders the construction of the track altogether illegal if the consent be not obtained, or whether the provision is a privilege given to the city as having authority over the precise location and construction of the tracks in the public streets and which it may waive or fail to enforce or to which an implied assent may be given by acquiescence, is a matter of construction of the statutes.²

"The defendant is the creature of legislation, enacted under a constitutional provision that says: 'The legislature shall pass no special act conferring corporate powers, but they shall pass general laws under which corporations may be organized and corporate powers of every nature obtained, subject, nevertheless, to repeal or alteration at the will of the legislature.' The defendant, therefore, by the very law of its being, got only what was granted, now possesses only what repeal or alteration has not taken away or modified, and can hold in the future only what repeal or alteration may leave undisturbed. The power to alter implies the power to regulate. Indeed, to alter usually is to regulate. The defendant cannot, in a constitutional sense, be deprived by this regulation of any right because it never was exempt from such regulation. There the Fourteenth amendment finds it and there it leaves it. If the exercise of the right of regulation is in any case absurd, so as to stultify the evident legislative purpose, the courts can rectify the error by applying some recognized canon of statutory interpretation. Within due limits the capacity of the lawmaking power to regulate the subject of insurance is unquestionable."³

A regulation adopted for public safety under the police power of the state is not a taking or damaging of private property without just compensation, although conformity to such regulations involves expense. Thus in *M. & E. R. R. Co. v. Orange*, 63 N. J. L. 252 (1899), it was held that a railroad company on the laying of a highway over its tracks is entitled to compensation for the use of the locus in quo for a highway crossing; that such use does not deprive the company of the use of the premises for the passage of its trains, and that when the crossing is at grade the injury to the company in that use of its property is so slight as to justify nominal damages. The court held that for an injury occasioned by necessary structural changes, such as the removal of buildings or changes in the tracks, compensation should be made which would be adequate under the circumstances, but that for the expenses incident to the erection and maintenance of gates, signboards, cattle-guards, and the like, including the expenses of a flagman, the company is not entitled to an allowance; such expend-

²—*North Jersey Street Ry. Co. v. Board of Street & Water Commissioners, etc.*, 73 N. J. Eq. 106 (1907).

³—*Iowa Life Insurance Co. v. East. Mut. Life Ins. Co.*, 64 N. J. L. 340 (Court of Errors & Appeals, 1900).

itures, being required either for the protection of the company in running its trains or of the public using the street at such crossings, are expenses incident to a compliance with police regulations, and, therefore, do not entitle the company to an allowance for them.

"When the scope of inquiry is confined to the single question of a reasonable regulation under the police power, it will be perceived that the fact that the prosecutor is a corporation can cut no figure. A corporation, although an artificial personality, holds its property and must use it under the same liability to police control as a citizen. The title to all property is held subject to the supreme consideration of the safety, health and comfort of the public. An act of incorporation simply guarantees to the incorporators the right to act and do business as a corporate body, subject, of course, to the laws of the land and the legitimate control of government." * * * It is indeed true that the power of police regulation by municipal corporations over corporations is restrained within narrower limits than its power over persons. This difference does not arise from any lack of power in the legislature to exert directly, or to delegate to municipalities the power to exert the same control over each. It springs out of the circumstance, that corporations, as the creatures of legislation, have often accompanying the grant of their franchises a grant of special powers and privileges coupled with limitations upon the right of municipal interference. The municipal legislature cannot by any regulation of its own abridge the privilege thus conferred, or infringe upon the limitations thus prescribed. This is so, because the act of incorporation is a law of the state, and because any by-law which runs counter to any law, whether organic or legislative, is void. The power to regulate still exists, but in these instances the legislature itself chooses to directly exercise the power or fix the limits within which it may be exercised by cities." ⁴

"In the following cases the Supreme Court has sustained municipal regulations imposed upon street railways in the exercise of the police power, viz., an ordinance requiring horse railroad companies to have an agent upon each car, in addition to the driver, to assist in the control and care of the car and its passengers, and to prevent accidents and disturbances of the good order and security of the streets (*Trenton Horse Railroad Co. v. Trenton*, 53 N. J. L. 132); an ordinance prohibiting the placing of salt upon street railway tracks, except on curves leading from one street to another (*Traction Co. v. Elizabeth*, 58 N. J. L. 619); an ordinance limiting the rate of speed of electric cars running in the streets (*Cape May Railroad Co. v. Cape May*, 69 N. J. L. 393); an ordinance requiring the use of fenders on the front of electric cars to prevent accidents (*Cape May Railroad Co. v. Cape May*, 59 N. J. L. 396); an ordinance requiring electric cars to come to a full stop at each street before crossing it (*Cape May Railroad Co. v. Cape May*, 59 N. J. L. 404); an ordinance having the effect of prohibiting a trolley company, already authorized to string electric wires upon poles in the

4—*Trenton Horse R. R. Co. v. Trenton*, 53 N. J. L. 132 (1890).

streets, from cutting or trimming any trees in so doing without first obtaining permission from the governing body (*Consolidated Traction Co. v. East Orange*, 69 N. J. L. 102)."⁵

A city ordinance which in terms requires all street railway companies to pave, repave and keep in repair, under the direction and to the satisfaction of the proper municipal authorities, the space between the rails of their tracks and between the tracks, and the space for one foot outside of each outer track, at the same time providing that if any company fail so to pave or repave, or to keep the pavement in repair, the city authorities may cause the work to be done, and the company shall, on demand, pay the cost thereof, is an assumption of the power of taxation and cannot be supported under the police powers conferred upon the municipality by the legislature.⁶

If the statute of a state authorizes the doing of a certain thing in the prosecution of a public work, a city ordinance that makes the doing of such a thing a penal offense unless the permission be first obtained, is not a valid exercise of municipal regulation. The general reason upon which this rule rests is that municipal control is one of regulation merely, is itself a delegated power, and hence is pro tanto, revoked or limited by the direct exercise of the legislative function. Where the legislature in the grant of franchises has prescribed the rights and privileges of a company, the city government cannot qualify or abridge the force of the legislative grant.⁷

A street railroad company uses as its roadbed public streets, provided and improved at public expense, and acquired and held for the benefit and advantage of the public at large. In this respect, such a company occupies a position different from that of a railroad company exercising its franchises and transacting its business upon a roadbed provided at its own cost and for its exclusive use, except at crossings over streets and highways. The legislature, in authorizing a street railroad company to make use of the public streets, intended that the grantee of such privileges should be subject to municipal regulations of a greater scope than would be allowable in the case of companies occupying and using their own roadbed.⁸

In *Consolidated Traction Co. v. East Orange*, 61 N. J. L. 202 (1897), affirmed 63 N. J. L. 669 (1899), the Court said: "Nearly all kinds of reasonable regulations can be imposed upon street railways in the use of the streets, by the municipality, under the authority granted by

6—*Fielders v. North Jersey St. Ry. Co.*, 68 N. J. L. 343 (Court of Errors & Appeals, 1902).

5—*Fielders v. North Jersey St. Ry. Co.*, 68 N. J. L. 343 (Court of Errors & Appeals, 1902).

7—*Hudson & Manhattan R. R. Co. v. Hoboken*, 75 N. J. L. 302 (1907); see also *Trenton Horse R. R. Co. v. Trenton*, 53 N. J. L. 132 (1890); *Madison v. Morristown Gas Lighting Co.*, 63 N. J. Eq. 120 (1902); *Consolidated Traction Co. v. East Orange*, 61 N. J. L. 202 (1897); *Hoboken & Manhattan R. R. Co. v. Hoboken*, 70 N. J. Eq. 122 (1905).

8—*Traction Company v. Elizabeth*, 58 N. J. L. 619 (1896).

the legislature to pass ordinances to regulate the use of the streets, and such resolutions are never declared unlawful on the ground that they impair the franchises of the company. Even direct legislative authority to a street railway company to carry passengers over the streets of a city does not exempt the corporation from municipal or police control. The principle is a general one, that when a business is authorized to be conducted by a corporation within a municipality, the latter presumptively possesses the same right to regulate it that it has over a like business conducted by private persons. A grant to a corporation of the right to own property and to transact business affairs confers no immunity from police control to which the citizen would be subjected, and a reasonable regulation of the franchise is not a denial of the right or an invasion of the franchise, nor a deprivation of its property, or interference with the business of the corporation. The company is presumed to know that the business of operating a city street railway must be conducted under such reasonable rules and regulations as the municipality may impose, and subject to its share of the burdens incident to the conduct of the municipal government." Citing *Trenton Horse Railroad Co. v. Trenton*, 53 N. J. L. 132 (1890); *Allen v. Jersey City*, 53 N. J. L. 522 (1891); *Traction Company v. Elizabeth*, 58 N. J. L. 619 (1896); *Cape May Railroad Co. v. Cape May*, 59 N. J. L. 396, 401 (1896).

It is the right and the duty of the governing body of such municipal corporations to provide that companies, in exercising their right to lay rails upon the public streets, shall perform the work with such reasonable despatch that travel shall not thereby be impeded or rendered less save for an unreasonable length of time, and an ordinance which contains a condition that the tracks shall be completed within a specified time is valid.¹⁰

Municipal ordinances regulating the use of the streets by railroad companies must not be unreasonable. "In this department of the law the difficulty has been with the application of this legal principle to various sets of facts. Whether a given by-law be reasonable or the reverse is usually a practical question, and not one that depends on abstract considerations of right or wrong."¹¹

A city ordinance which prohibits digging up the surface of any street except by permission of the board of aldermen first had and obtained, as applied to a railroad company laying its track across a street within its located right of way, is not a reasonable regulation of the company's exercise of its corporate franchises. Such an ordinance in effect declares that a right conferred by the legislature shall not be exercised except by the consent of the city government, and in that respect the ordinance is illegal and void.¹²

10—*Carstadt v. City Trust Co.*, 69 N. J. L. 44 (1903).

11—*Pennsylvania R. R. Co. v. Jersey City*, 74 N. J. L. 286 (Court of Errors & Appeals, 1885).

12—*Allen v. Jersey City*, 53 N. J. L. 522 (1891).

"The question of the power of a municipal corporation, required by law to give consent before an act may lawfully be done, to annex conditions to such consent, was discussed in *Jersey City & Bergen Railway Co. v. Jersey City & Hoboken Horse Railway Co.*, 5 C. E. Gr. 61. The conclusion reached by Chancellor Zabriskie was that the right to impose such conditions extended to the subject matter on which consent was required. He expressed the opinion that such a right would not extend to conditions affecting the exercise of charter powers with respect to which consent was not required. This, in my judgment, is a correct exposition of the law on the subject. Thus, I think the town of Harrison might well annex to its consent to lay pipes, conditions providing for their being laid so as to preserve, as far as possible, the public use of the streets, and requiring them to be put in complete repair." ¹³

In *Township of Landis v. Millville Gas Light Co.*, 72 N. J. Eq. 347 (1906), it was held that a township may, by bill in equity, prevent the use of its highway by a gas company who is engaged in the act of laying gas pipes in such highways without legislative authority. The relief granted to the township in such case may also prevent the use of the gas pipes already lawfully laid in the highways of the township when the pipe so laid has not been connected with buildings or brought into use.

Under the water company act of 1876, a municipality has power to impose terms as to the rates to be charged for both private and public consumption. "But, independent of such statutory provision, I think it is the province and the duty of the municipality, whenever opportunity offers, to exercise its power in the protection of its inhabitants against extortion, and to secure them a supply of water and gas from corporations assuming to furnish those commodities at reasonable rates. I so held in *Public Service Corporation v. American Lighting Company*, 67 N. J. Eq. 122, and see *Davis v. Harrison*, 46 N. J. Law, 79 (at p. 85); *Lake v. Ocean City*, 62 N. J. Law, 160 (at p. 162); and *Carlstadt v. City Trust Co.*, 69 N. J. Law, 44.

"The water company is exercising a public franchise, which, from its own mode of exercise, is necessarily, during its continuance, a practical monopoly, and it follows, beyond all question, that its charges for its supply must be reasonable. And it would be strange, indeed, if the municipal government, which so to speak imposes this monopoly upon its citizens, were powerless to protect them against unreasonable charges." ¹⁴

A common council cannot repeal an ordinance granting permission to an electric light company to place its poles and stretch its wires on all the streets and alleys of the town when the company has conformed to the conditions of the ordinance so far as required, and has expended

13—Magie, J., in *Davis v. Town of Harrison*, 46 N. J. L. 79, 84 (1884).

14—Pitney, V. C., in *Long Branch Commission v. Tintern Manor Water Co.*, 70 N. J. Eq. 71 (1905).

money in placing poles and wires on other streets, notwithstanding the common council may have been misled in passing the ordinances.¹⁵

In granting to a traction company the right to locate its tracks in a public street of a municipality the governing body of the municipality performs a legislative function in granting a special user of the public highway, and in setting bounds and limits to such user and imposing conditions thereon.¹⁶

"As to all public rights in the street, the municipal action was clearly legislative. It became judicial only in case it imposed an additional burden on the land of the abutting owners. That such has not been held to be the legal effect of ordinances granting to railroads operated by the trolley system the right to lay tracks in the streets will appear from two expressions of opinion by the Chancellor and at least one in the Supreme Court. *West Jersey Railroad Co. v. Camden, Gloucester & Woodbury Railway Co.*, 7 Dick. 31; *Borden v. Atlantic Highlands & Red Bank Railway Co.*, 18 N. J. L. J. 305; *Kennelly v. Jersey City*, 57 N. J. L. 293.

"In the last case cited Mr. Justice Dixon said: 'The adoption of the trolley system and the laying of double tracks in the street do not involve private rights.'

"In *Roebbling v. Trenton Passenger Railway Co.*, 58 N. J. L. 666, 673, Mr. Justice Depue, delivering the opinion of this court, said: 'I agree with those cases in our courts which hold that the substitution of electric motors with the trolley system for horses on street railroads does not, per se, create an additional easement.'

"The board question touched upon by these opinions is not, however, involved in the decision of the point now before us, which is not the right of the route of the railroad but the mere location of its tracks. The route of the railroad and the proceedings upon which rests its right to be in the streets are not before us. The right of the railroad in this respect must be assumed upon this writ of error. This being so, it would seem to be clear that the location of the tracks in the street was a question that called for legislative action only. It was as purely an act of municipal regulation of the use of the highways as was the consent to the proposed route. The 'restriction,' which is the immediate subject of review, being of a subsidiary nature can rise no higher than its sources. If the 'consent' and the 'location' were acts of legislation, the 'restriction' was of the same character. The case is, therefore, strictly analogous to that of *Roebbling v. Trenton Passenger Railway Co.*, above cited, in which this court decided that an ordinance prescribing, under legislative authority, the places in the street where trolley poles should be placed did not create an additional easement upon the lands of the prosecutor and abutting owner. Such action by

15—*Phillipsburg Electric Co. v. Phillipsburg*, 66 N. J. L. 505 (1901); see also *Hudson Telephone Co. v. Jersey City*, 49 N. J. L. 303 (1887); *Suburban Electric Light & Power Co. v. East Orange*, 41 Atl. Rep. 865.

16—*Rutherford v. Hudson River Traction Co.*, 73 N. J. L. 227 (1906).

the municipality was held to be a regulation of the public use and not an infringement of private rights. If the location of poles upon the lands of an abutter be not a private injury, the location of tracks certainly is not.

"The passage of the supplemental ordinance in the present case being therefore a regulation of the public use was an act of legislation for which notice was not required."¹⁸

An ordinance regulating the excavation of public streets will not be set aside in toto because it unreasonably interferes with the exercise of the franchises of a single corporation, provided it be unobjectionable in other respects; and it is only when it is actually interfered with in the enjoyment of its franchises by the enforcement of such ordinance that a corporation can raise the question of its validity.¹⁹

In *Trenton Horse R. R. Co. v. Trenton*, 53 N. J. L. 132 (1890), the Supreme Court laid down the following rules in respect to municipal ordinances regulating corporations using the public streets:

"First. A rule of construction to be applied is, that when an ordinance is passed upon a matter clearly within a general power, the presumption is in favor of its reasonableness. The judicial power to declare it void can only be exerted when from the inherent character of the ordinance or from evidence taken showing its operation it is demonstrated to be unreasonable. (*Paxson v. Sweet*, 1 Gr. 196.)

"Secondly. When an ordinance is attacked in toto, if it may operate reasonably in some instances and unreasonably in other instances, the ordinance must stand. (*Pennsylvania R. R. Co. v. Jersey City*, 47 N. J. L. 286).

In a proceeding to take away rights granted by an ordinance or otherwise possessed by an individual or corporation, a municipality can only act after notice and opportunity to be heard has been given to the person or corporation whose property rights are to be affected.²⁰

The legislature, when it authorizes the use of the public streets for street railway purposes, is presumed to intend that the grantee of the franchises should hold its privileges subject to such regulations as are reasonably necessary for the common use of the street for a street railway and for ordinary travel. Where an ordinance is within the powers granted to the municipality in its charter, the presumption is that it is reasonable. The judicial power to declare it void can be exerted only when, from the inherent character of the ordinance or from evidence taken showing its operation, it is demonstrated to be unreasonable.²¹

18—*Moore v. Haddonfield*, 62 N. J. L. 386 (Court of Errors & Appeals, 1898).

19—*Gas Light Company v. Rahway*, 58 N. J. L. 510 (1896).

20—*Hutton v. Camden*, 39 N. J. L. 122 (Court of Errors & Appeals, 1876); *Traction Co. v. Board of Works*, 56 N. J. L. 431 (1894); *Stanley v. Passaic*, 60 N. J. L. 392 (1897); *Dodd v. State Board of Health*, 67 N. J. L. 463 (1902); *Vanatta v. Morristown*, 34 N. J. L. 445 (1871); *Jersey City etc., Ry. Co. v. Passaic*, 68 N. J. L. 110 (1902).

21—*Traction Co. v. Elizabeth*, 58 N. J. L. 619 (1896).

85. JUDICIAL CONTROL OF CORPORATIONS.

Courts will not in ordinary circumstances, interfere with the internal management of corporations acting within their powers, but this rule has no application to transactions that are ultra vires the company, or prohibited by positive law.¹

"The fact that a corporation is an entity, representing an aggregation of skill and capital, does not curtail its right to transact the business which the state's charter empowers it to conduct with exactly the same freedom as a citizen. So long as by the policy of this state the formation of corporations is permitted, so long will the right of such artificial persons to act within the scope of their franchises be in no sense different from the right of an individual. The control of a court of equity over the business conduct of either is exactly the same. The contracts of either will be rectified, annulled or specifically enforced, and the duties of either as trustee or its right as cestui que trust will be enforced and protected. Any illegal conduct of either leading to irreparable injury will be enjoined. A nuisance created by either will be restrained. Indeed, whenever either an individual or corporation becomes related to any other individual or corporation, so that equitable jurisdiction arises to remedy some wrong or secure some right, it matters not whether both parties are individuals or both corporations, or that one is a natural and the other an artificial person. The cases cited upon the argument, wherein a court of equity has enjoined the acts of a corporation, will be found to be cases where quasi public corporations have acted outside of the scope of their charter privileges, or have violated an implied limitation upon its general power, so as to create a nuisance or a public injury. * * * Now, it may be conceded that if this corporation had entered into an agreement with other manufacturers of these goods, whether these manufacturers were individuals or corporations, by which agreement prices were to be fixed and competition paralyzed, such an agreement would be a subject of equitable cognizance. Such was the case of *Stockton, Attorney-General v. Central Railroad Co. and Philadelphia & Reading Railroad Co.*, 50 N. J. Eq. 52."²

"It must be remembered in this connection that these companies are not exercising any public franchise of carrying passengers or goods, but only the franchise of being a corporation. Their business is one that may be conducted by private individuals. They are simply the owners

1—*Siegmán v. Electric Vehicle Co.*, 72 N. J. Eq. 403 (Court of Errors & Appeals, 1907); *Dodge v. Woolsey*, 18 How. 331; *Hawes v. Oakland*, 104 U. S. 450; *Corbus v. Gold Mining Co.*, 187 U. S. 455; *Leslie v. Lorillard*, 110 N. Y. 519; *Gamble v. Q. C. W. Co.*, 123 N. Y. 91; *Dunphy v. Travelers' Newspaper Association*, 146 Mass. 495; *Ellerman v. Chicago Junction Ry. Co.*, 49 N. J. Eq. 217 (1891); *Edison v. Edison United Phonograph Co.*, 52 N. J. Eq. 620 (1894).

2—Vice-Chancellor Reed, in *Attorney-General v. American Tobacco Co.*, 55 N. J. Eq. 352 (1897); affirmed 56 N. J. Eq. 847 (Court of Errors & Appeals, 1898).

of a certain species of property which, in its natural state, is of no use to mankind, and which, after it has been manufactured and made fit for use, can hardly be classed as a necessity. * * * Now, I am unable to find any foundation, either in law or in morals, for the notion that the public have the right to have these private owners of this sort of property continue to do business in competition with each other.”³

No rule of law is better settled than that which declares that so long as the directors of a corporation keep within the scope of their powers and act in good faith and with honest motives, their acts are not subject to judicial control or revision.⁴

But whether the directors are acting in good faith and as honest, diligent trustees, or not, will be inquired into by the courts at the instance of stockholders.⁵

The power conferred by section 44 of the Corporation act, summarily to order books of a corporation to be forthwith brought within this state, is exercisable by a justice of the supreme court, or by the court of chancery, only when a situation exists in which the judicial authority whose action is invoked can exercise control over the books after compliance with the order. That situation constitutes the “proper cause” contemplated by the act.⁶

Proceedings by way of contempt will lie against corporations as well as against individuals. In the case of individuals, the process is by attachment, followed by a fine or imprisonment or both. Against corporations the writ of attachment is inappropriate. Distringas will be issued as an original, to be followed, if necessary, by an *alias* and *pluries*, until justice be done.⁷

Duties that arise from the terms and conditions contained in municipal ordinances, pursuant to which a corporation is enjoying its occupation of the public rights and streets of such municipality, are of such a nature that their performance may be enforced by writ of mandamus.⁸

“The doctrine, that a court of equity will not act in any instance where the common law courts possessed adequate power to afford the relief asked for, is fundamental. The power of the common law courts to compel the performance of duties of the kind under consideration [to construct a bridge across a cut, which cut impeded public travel along a public road], which were imposed upon railroad companies, was and is complete. The appropriate writ for the accomplishment of that purpose is the writ of mandamus. I know of no case which holds—certainly no case can hold by the application of correct principle—that a court of equity will issue a mandatory injunction in any instance in which the

3—Meredith v. Zinc & Iron Co., 55 N. J. Eq. 211 (1897).

4—Edison v. Edison United Phonograph Co., 52 N. J. Eq. 620 (1894).

5—Groel v. United Electric Co. of New Jersey, 70 N. J. Eq. 616 (1905).

6—Fuller v. Hollander & Co., 61 N. J. Eq. 648 (Court of Errors & Appeals, 1900).

7—West Jersey Traction Co. v. Camden, 58 N. J. L. 536 (1896).

8—Pleasantville v. Atlantic City Traction Co., 75 N. J. L. 279 (1907).

duty imposed is of that official or corporate quality where a court of common law is competent to adequately compel its execution."⁹

An injunction is not a proper process to compel a gas company to furnish gas to a consumer, unless it is shown that a mandamus is not an adequate remedy. "The ground taken by the demurrer is that, assuming that a duty rested upon the company to furnish gas (*Olmsted v. Proprietors of the Morris Aqueduct*, 47 N. J. L. 311, 324), nevertheless, the complainants have no right to invoke equitable relief by way of injunction. I am of the opinion that this objection is well taken. The duty of the corporation to furnish gas was a legal corporate duty, and such duty is enforceable only by writ of mandamus. (*New York Railroad Co. v. Montclair*, 47 N. J. Eq. 591; *Barber v. West Jersey Title Co.*, 53 N. J. Eq. 158.) The counsel for the complainants cited a number of cases decided in other jurisdictions, in which relief by injunction was granted to enforce corporate duties like this. But, upon examination, those cases will be found either to have been decided in states where the methods of judicial procedure are unlike ours, or they are cases in which some distinct element was presented which destroyed the adequacy of the relief afforded by writ of mandamus, or they were cases where the corporate duty was contractual and not legal. * * * The injunction prayed for in this bill, although put in a preventive form, is, in fact, a mandatory writ. There is no fact or collocation of facts stated in the bill which display any inadequacy in the relief which a writ of mandamus will furnish in compelling the performance of the legal duty of the defending company to turn on the supply of gas to this particular dwelling."¹⁰

Mandamus is the proper remedy to compel a street railway company to perform the duty of maintaining and operating such railway for the benefit of the public. The public duty imposed upon the company is always active, potential and imperative, and must be executed until lawfully surrendered, suspended or abandoned by the legally expressed consent of the state, and the performance of this duty can be lawfully enforced by mandamus. The municipality, in the streets of which the railway is located by ordinance, is a proper relator in a proceeding by mandamus to enforce the duties of the company towards the public.¹¹

The supreme court may by mandamus enforce performance by a traction company of its duty to pave a street pursuant to the terms of the ordinance granting to its predecessor the right to locate tracks in such street.¹²

The right of a person to be transported by a railroad company may be enforced by mandamus.¹³

The rule is well settled, however, that the supreme court will not

9—*New York, etc., R. R. Co. v. Township of Montclair*, 47 N. J. Eq. 591 (Court of Errors & Appeals, 1890).

10—*Johnson v. Atlantic City Gas & Water Co.*, 65 N. J. Eq. 129 (1903).

11—*Bridgeton v. Traction Co.*, 62 N. J. L. 592 (1899).

12—*Rutherford v. Hudson River Traction Co.*, 73 N. J. L. 227 (1906).

13—*Atwater v. D. L. & W. R. R. Co.*, 48 N. J. L. 55 (1886).

interfere by way of mandamus unless there is a clear legal obligation shown to perform the duty required.¹⁴

If the duty commanded is incumbent upon a corporation the writ should be directed either to the corporation or to the select body within the corporation, whose province and duty it is to perform the particular act, or put the necessary machinery in motion to secure its performance, and the return must be made by those to whom the writ is directed. The only means of compelling a return to a writ of mandamus, or obedience to its command, is by attachment, which will only go against such persons as have been served with the writ; therefore, to make the writ efficacious, it must be served upon the officers of the corporation who have the power and whose duty it is, to execute it, and against whom an attachment to enforce obedience may issue.¹⁵

A writ of error will not lie in this state to review the decision of the Supreme Court on the award of a mandamus.¹⁶

And the refusal of the Supreme Court to grant a mandamus is not reviewable on error.¹⁷

Excepting in cases decided in the supreme court upon the constitutionality of a statute.¹⁸

Quo warranto is the appropriate remedy by which to test the title to office in a private corporation.¹⁹

Where a proceeding, whatever its form only involves controversy as to which of two sets of rival officers of the corporation is legally elected, the jurisdiction to determine the controversy is exclusively in a court of law, and quo warranto is the proper remedy to test the question where no other statutory method has been substituted therefor.²⁰

The granting of an information, is not now a mere matter of course, but depends upon the sound discretion of the court, according to the particular circumstances of the case, made upon the application for leave to file an information: as where the right, or the fact on which the right depends, is disputed, or where the right turns upon a point of new or doubtful law. Where the court have granted leave to file an information, the usual course is for the defendant either to put in a disclaimer, or to plead to the information, by setting out his title to the office; to which plea, the Attorney-General may reply, or demur, as in other cases.²¹

14—State, *Bush v. Warren Foundry & Machine Co.*, 32 N. J. L. 439 (1868).

15—Freeholders of Mercer *v. Pennsylvania Ry. Co.*, 41 N. J. L. 250 (1879).

16—Layton *v. State*, 28 N. J. L. 575 (1860).

17—American Trans. Co. *v. N. Y., S. & W. R. R. Co.*, 59 N. J. L. 156 (Court of Errors & Appeals, 1896).

18—Neptune Township *v. Mannion*, 73 N. J. L. 816 (Court of Errors & Appeals, 1907).

19—Hankins *v. Newell*, 75 N. J. L. 26 (1907).

20—Barna *v. Kirczow*, 71 N. J. Eq. 196 (1906); *State v. Crowell*, 9 N. J. L. 390 (1828).

21—State *v. Utter*, 14 N. J. L. 84 (1833).

The law is entirely settled that the court may grant leave to file an information in the nature of a quo warranto, at the instance of a private relator, against an officer of a corporation for an unlawful intrusion into an office on grounds affecting his individual title although the same objections apply to the title of every other officer and member of the corporation, and the application is incidentally, in effect, against the whole corporate body.²²

"An information in the nature of a quo warranto is not regarded as an action, in the sense used in the statute. It involves a civil right, that of holding an office, and the relator may recover his costs against the defendant or be adjudged to pay costs to him; but it is in the nature of a criminal proceeding. It is in the name of the state, for an offence alleged to have been committed against the state in the usurpation of some office or franchise; and the offender may not only have judgment of ouster against him, but be fined for his intrusion." To an information in the nature of a quo warranto the defendant can plead but one plea.²³

The Supreme Court, upon reasonable ground, disclosed by affidavit, will allow an information in the nature of a quo warranto, to be filed in the name of the attorney general, at the relation of any person or persons desiring to prosecute the same.²⁴

As to the form of judgment in quo warranto proceedings, see *State v. Atlantic City & S. R. Co.*, 77 N. J. L. 465 (Court of Errors & Appeals. 1909).

Certiorari is not the proper remedy to review a resolution of a private corporation removing its president from office, or proceeding to reinstate or re-elect directors who had resigned, in a case where mandamus or quo warranto are available remedies. "In our own state, liberal as we have been in the use of this writ, we have frequently had occasion to call attention to the circumscribed character of its use even in the case of public municipal corporations, and it seems to be now settled that certiorari is not the proper remedy where the office is already filled. Its use in the case of private corporations seems to have been limited to acts of the private corporation which were judicial in character; thus, in *Elder v. Medical Society of Hudson County*, 6 Vroom. 200, proceedings to punish the prosecutor for unprofessional conduct as a physician were reviewed, but this was upon the ground that the society was a special statutory tribunal whose adjudication might affect the prosecutor's rights, and the writ of certiorari in that case was in the nature of a writ of error. In the latter case of *Watson v. Medical Society of New Jersey*, 9 Id. 377, Mr. Justice Depue was careful to call attention to the distinction between quo warranto and mandamus and certiorari. He said. 'It is doubtful, at least, whether

22—*Terhune v. Potts*, 47 N. J. L. 218 (1885); *State v. Tolan*, 33 N. J. L. 195 (1868).

23—*State v. Roe*, 26 N. J. L. 215 (1857).

24—*Camman v. Copper Mining Co.*, 12 N. J. L. 34 (1830).

certiorari, which tears down, but does not build up—which, if successfully prosecuted, would vacate the resolution without ousting the sitting members or admitting the rejected claimants, is an appropriate remedy.' Subsequently, in *Lehmann v. Hudson County Republican Committee*, 33 Id. 574, the court refused to concede the power or duty of this court to intervene in a controversy of the character there presented. In the present case the proceedings are not judicial in their character; the directors whose title is questioned are actually in possession of the office, and the proper remedy is either by quo warranto to oust the directors or by a mandamus to compel the board to recognize the authority of the president. Certiorari is not the proper remedy. The reason given by Mr. Justice Depue in the passage above quoted is convincing; the effect of the judgment would be merely to tear down the resolution in question; it would not give the prosecutors the relief they need. I should, of course, not reach this result if I thought I was departing from anything that has actually been decided by the court, but I do not feel bound merely because the court in an uncontested case has failed to consider an objection to procedure."²⁵

Certiorari will not lie in favor of private prosecutors to review the action of public officials unless such prosecutors have a personal or property interest which will be specially and immediately affected by the action complained of; and unless the person who applies for the writ shows that he will suffer a special injury beyond that which shall affect him in common with the remainder of the public, the writ will be denied him.²⁶

In *People's Gas Light Co. v. Jersey City*, 46 N. J. L. 297 (1884) it was held that gas companies having the right to use the streets of a city for their gas-pipes, may, by certiorari, challenge the legality of municipal proceedings designed to give similar rights to rival companies, and individuals owning the soil of a street may also question the claim of a gas company to lay pipes therein. "These two corporations have special business privileges which they are entitled to protect against any unlawful rivalry. *R. & D. B. R. R. Co. v. D. & R. Canal Co. et al.*, 3 C. E. Green 546; *Penna. R. R. Co. v. Nat. R. Co.*, 8 C. E. Gr., 441; *N. J. South R. R. Co. v. Long Branch Com'rs*, 39 N. J. L. 28. And these individual prosecutors have estates in the soil of the streets from which they have a right to avert threatened trespasses. *Hunt v. Lambertville*, 45 N. J. L. 279."²⁷

"The rights and duties of corporations are in general regulated by the common law; but where there is no plain and adequate remedy at law, and a case is presented which calls for equitable relief, a suit in equity may be maintained. To induce this court to interfere with the

²⁵—*Overman v. Manly Drive Co.*, 77 N. J. L. 290 (1909); distinguishing *Stephany v. Liberty Cut Glass Co.*, 76 N. J. L. 449 (1908).

²⁶—*Tallon v. Hoboken*, 60 N. J. L. 212 (Court of Errors & Appeals, 1897).

²⁷—*Peoples' Gas Light Co. v. Jersey City*, 46 N. J. L. 297 (1884).

management of the affairs of a corporation or to justify it in so doing, there must be some special equitable reason, some wrong done or about to be done, for which the law will not afford adequate redress." 28

"In equity as in the law court, the Attorney General has the right, in cases where the property of the sovereign or the interests of the public are directly concerned, to institute suit, by what may be called civil information, for their protection. The state is not left without redress in its own courts because no private citizen chooses to encounter the difficulty of defending it, but has appointed this high public officer, on whom it has cast the responsibility and to whom, therefore, it has given the right of appearing in its behalf and invoking the judgment of the courts on such questions of public moment." 29

As to the enforcement of public rights in chancery against public service corporations, see *Metuchen v. Pennsylvania Railroad Co.*, 71 N. J. Eq. 404 (1906).

A preliminary injunction will not be allowed in proceedings instituted by the attorney general to restrain the construction of an electric street railway, on the ground that the consent of the municipal authorities, which has been in fact or form given, is illegal, in that the ordinance does not comply with the Traction Laws of 1893 and 1894, and the act of March 11, 1893, governing the use and location of poles in public streets, when the questions raised are purely legal and are pending before a court of law for decision, in a proceeding upon which the ordinance, if invalid, may be set aside altogether.³⁰

"A long line of decisions in this state declares that a private citizen cannot sustain a bill to abate a public nuisance, unless he suffers in himself or his property some special injury peculiar to himself, and not as one of the public. *Van Wagenen v. Cooney*, 18 Stew. Eq. 25, and cases there cited. * * * The court of appeals has declared that a court of equity will not enjoin an offence against the public at the instance of an individual, unless he suffers some private, direct and material damage beyond the public at large, as well as damage otherwise irreparable." 31

But where the injury complained of is the building of a railroad station in the street, in front of complainant's property and he owns the soil in the street upon which it is built, the injury is to his individual rights and not as part of the public, and the suit must be brought in his own name.³²

28—*Stettauer v. New York & Scranton Construction Co.*, 42 N. J. Eq. 46 (1886).

29—*Attorney-General v. Delaware & Bound Brook R. R. Co.*, 27 N. J. Eq. 631 (Court of Errors & Appeals, 1876). See also *Attorney General v. Firemen's Insurance Co.*, 74 N. J. Eq. 372 (Court of Errors & Appeals, 1909).

30—*Stockton v. North Jersey Street Ry. Co.*, 54 N. J. Eq. 263 (1896).

31—*Humphreys v. Eastlack*, 63 N. J. Eq. 136 (1902); *Morris & Essex R. R. Co. v. Prudden*, 20 N. J. Eq. 530 (1869).

32—*Higbee & Riggs v. Camden & Amboy R. R. Co.*, 19 N. J. Eq. 276 (1868).

Equity will not enjoin an unauthorized obstruction in a public highway, at the instance of a private person, corporate or natural, who does not suffer some special damage from it, differing in kind from the damage which such person sustains merely as a member of a community.³³

Jurisdiction to determine how conflicting easements of way across the same place shall be occupied and used by two or more holders of such easements, is vested in the court of chancery. That jurisdiction is one of the inherent equitable powers of the court of chancery, which is incapable of exercise by any other forum, and is protected by article 6, section 1 of the constitution of this state. Thus, where a newly-organized company is authorized to lay its railroad tracks at grade across the existing tracks of another railroad, and the construction proposed involves only such a crossing, the new company should pay the expenses incident to the safe construction of its tracks across those of the senior company.³⁴

The jurisdiction of the court of chancery may rightfully be invoked by a municipality to protect the highways from a railroad company's wrongful exercise of its admitted rights at a crossing.³⁵

Where a water company refuses to supply water, the court of chancery may under some circumstances give relief by injunction.

In *McDowell v. Avon-by-the-Sea, etc., Co.*, 71 N. J. Eq. 109 (1906), Vice-Chancellor Emery said:

"Defendant insists that a Court of Equity has no jurisdiction (to compel a water company to supply water) and that the proper and only remedy is by mandamus. No decision granting a mandamus has, however, been cited and this court has in several cases exercised the jurisdiction. (*Dayton v. Quigley*, 29 N. J. Eq. 77 (1875); *Coe v. Railway Co.*, 30 N. J. Eq. 440 [1879].) In neither of these cases does the question of the exercise of equitable jurisdiction appear to have been specially raised or considered; but in a later case—*Johnston v. Belmar*, 58 N. J. Eq. 354 (1899), the point was considered and decided, and I concluded that a right of this character involved the reasonable and comfortable enjoyment of a home or residence for the owner and his tenants, and that the only effective method of protecting the complainant's right in that case was by injunction. In *Johnson v. Atlantic City Water Co.*, 65 N. J. Eq. 129 (1903), Vice-Chancellor Reed, in a case heard on demurrer to a bill, held that equitable relief by way of injunction should not be extended to require the furnishing of gas by a gas company because this could be compelled by mandamus if the company were under a public duty to furnish it. This related, however, to the relief upon final decree, and it was expressly stated in his

33—*West Jersey R. R. Co. v. Camden, etc. Ry. Co.*, 52 N. J. Eq. 31 (1893).

34—*West Jersey & Seashore R. R. Co. v. Atlantic, etc., Trac. Co.*, 65 N. J. Eq. 613 (1904).

35—*Easton & Amboy R. R. Co. v. Greenwich*, 25 N. J. Eq. 565 (Court of Errors & Appeals, 1874).

opinion that no facts were disclosed in the bill which made relief by mandamus inadequate. Inasmuch as the previous cases exercising the jurisdiction to require a supply of water were not cited or referred to, it must be assumed, I think, that it was not intended to overrule or disapprove the doctrine of the previous cases. * * * For these reasons therefore and for the additional reasons that the cases relied on in *Johnson v. Atlantic City Water Co.* to support the remedy by mandamus, related to rights of an entirely different character from that of the comfort or enjoyment of a home or residence, and that there has, as yet, been no decision in our courts of law allowing a mandamus in these cases, I think this decision should not be considered as controlling the present case on the question of the exercise of equitable jurisdiction, but that the complainant's case should be considered on its merits."

In a suit to determine reasonable rates at which a water company should be compelled to furnish water to a city for public and private consumption, such rates should be established as will enable the water company to derive a fair income, based on the fair value of its property at the time it is being used by the public, taking into account the cost of maintenance and depreciation, current operating expenses, and the right of the public to have no more exacted than the service in itself is reasonably worth, including a fair income to the stockholders on their investment.³⁶

In that case the rule was applied and rates fixed for the various services performed.

"The remedy by mandamus, however, is only effective to command the doing of an act which it is the corporate or official duty of the defendant to perform. It is not the equivalent of an injunction, and the court which has power to issue it has no means under its procedure to grant temporary relief pending the hearing and final disposition of the application for the writ. As a result there are many cases, of which this one may be an example, in which injury claimed to be irreparable will take place before the common-law court can decide the legal rights of the parties. Since, however, the hands of a court of equity are tied until such legal right is settled, or, to speak more exactly, the legal principle has been settled, there is in the existing state of the law no provision for such a situation. I think that it is a subject which should receive careful consideration by those who have the power to alter it, and that the rigidity of the present rules respecting the granting of preliminary injunctions to protect legal rights might well be relaxed in many cases so as to permit a court of equity to hold matters in statu quo until the rights of the parties may be settled at law. Since this was a course which was urged upon me as a proper one to adopt in this case, so that the ends of justice might be served,

³⁶—*Pitney, V. C.*, in *Long Branch Commission v. Tintern Manor Water Co.*, 70 N. J. Eq. 71 (1905); affirmed 71 N. J. Eq. 790 (Court of Errors & Appeals, 1907).

I gave it the fullest consideration; but, in view of the decisions of the courts of this state bearing upon the questions which arise in this case, I reach the conclusion that, under our decisions, this course is not only unauthorized but would be directly in the face of the precedents." ³⁷ It was held that mandamus was an adequate remedy to compel a railroad company to maintain a station at a certain point.

In case of ultra vires proceedings, equity will give such appropriate relief as may be practicable, against the illegal act, at the suit of a single stockholder. But it will not interfere in a matter involving no breach of trust but only error of judgment on the part of the representatives of the company, even though such error may eventuate in the injury of the stockholders.³⁸

Nor will the court interfere in matters of business policy. Vice-Chancellor Pitney said:

"How far this destructive competition may be properly carried on without injury to the corporate interests is a concrete question to be decided by the parties in interest in each particular case. It is supposed that such competition inures to the benefit of the public. Be that as it may, no case has been cited in support of the proposition that a court of chancery ought to restrain such competition in a case like this, unless it appears that the directors are not acting in good faith for the best interests of the corporation, or, possibly, that they are plainly mistaken in their judgment—so plainly as to render the mistake palpable to the court. The allegations of the bill do not show any such lack of good faith or clear mistake of judgment." ³⁹

"If stockholders in a corporation disapprove of the company's management, which is conducted without fraud, or by action ultra vires, or in gross abuse of trust, or shall consider their speculation a bad one, their remedy is to elect new officers or sell their shares and withdraw. Where the question is one of mere discretion in the management of corporate business by directors, or of doubtful event in the undertaking which the corporation has embarked, remedy cannot be had by application to a court of equity.⁴⁰ But where it plainly appears that the object for which the company was formed is impossible of attainment, it becomes the duty of the company's agents to put an end to its operations and wind up its affairs, and should they, even though supported by a majority of the shareholders, pursue operations which must eventually be ruinous, any shareholder feeling aggrieved would, upon plain equitable principle, be entitled to the assistance of this court, and a decree should be made compelling the directors to wind up the company's business and distribute the assets among those

37—Garrison, V. C., in *Jacquelin v. Erie R. R. Co.*, 69 N. J. Eq. 432 (1905).

38—*Elkins v. Camden & Atlantic R. R. Co.*, 36 N. J. Eq. 5 (1882).

39—*Trimble v. American Sugar Refining Co.*, 61 N. J. Eq. 340 (1901).

40—Citing *Elkins v. Camden & Atlantic R. R. Co.*, 36 N. J. Eq. 241 (1882); *Park v. Grant Locomotive Works*, 40 N. J. Eq. 114 (1885); affirmed 45 N. J. Eq. 244 (Court of Errors & Appeals, 1888).

who are entitled to them, unless they can lawfully be used for other business purposes allowed by the charter. This course is pursued in case of partnerships in similar situation, and, for the reasons there controlling, I perceive no reason why it should not also be pursued in the case of corporations." ⁴¹

"Ordinarily courts of equity will not interfere with the management of the affairs of a corporation, but when through fraud a serious wrong is threatened, for which there can be no adequate redress at law, special reason for equitable interference is presented, which demands the protection that a court of equity is able to afford." Thus it was held, that where, by fraudulently refusing to transfer stock, the fraud-doers were put in position, through the control they thereby acquired, to seriously prejudice the interests of those who were justly entitled to the transfer, and so act as to make their purpose to accomplish that prejudice apparent, the meeting they could control would be stayed by injunction until the transfers could be compelled.

Chancellor McGill issued an injunction restraining the holding of any meeting of stockholders until further order in the suit.⁴²

"The frauds of these defendants as directors of this corporation are all capable of adequate remedy and complete redress by the court within the principles of remedial and preventive equity. This being so, the court was not justified in a decree of first instance in stopping the business of a solvent company and taking possession of its affairs for the mere purpose of aiding the withdrawal of the injured party with a proportionate share of the corporate property and its increment, assuming such jurisdiction to exist in any case in the first instance. In case of a contumacious disregard of its decrees, a court of equity has and may put forth powers of a compulsory and punitive character greatly in excess of those exercised by it in its ordinary remedial jurisdiction. To justify the employment of these extraordinary powers there should be, however, something more than an apprehension that the frauds redressed, or others of a like nature, will be repeated in the face of the decree forbidding them." ⁴³

"The general jurisdiction of equity over corporate bodies does not, in the absence of express statutory authority, extend to the power of dissolving the corporation or of winding up its affairs and sequestrating the corporate effects and property; and courts of equity will not, ordinarily, by virtue of their general equitable jurisdiction or of their visitorial powers over corporate bodies, sequester the effects of the corporation, or take the management of its affairs from the hands of

41—Chancellor McGill, in *Benedict v. Columbus Construction Co.*, 49 N. J. Eq. 23 (1891).

42—*Archer v. American Waterworks Co.*, 50 N. J. Eq. 33 (1892).

43—*Laurel Springs Land Co. v. Fougeray*, 50 N. J. Eq. 756 (Court of Errors & Appeals, 1893). See also *Sternberg v. Wolff*, 56 N. J. Eq. 389 (Court of Errors & Appeals, 1898).

its own officers and entrust it to the control of a receiver of the court upon the application either of creditors or shareholders." 44

The jurisdiction of the court of chancery to compel production for inspection, of books and papers, whether of an individual or corporation, is confined to cases where the same are evidential in a cause pending in the court, and cases arising under a bill filed for relief as well as discovery, or under a bill filed for discovery only, in aid of a prosecution or defense in litigation pending or contemplated.⁴⁵

The court of chancery has no jurisdiction to determine as to the validity of an election of the directors of a private corporation, and whether certain persons claiming to be, and acting as directors, are such. It can, therefore, grant no relief that is merely incident to that power. The only adequate remedy is in the courts of law, which have power to adjudge the office vacant, and to compel the admission of a person properly elected.⁴⁶

"It is clear that a court of equity has no jurisdiction to remove an officer of a corporation from an office of which he has possession, or to declare the forfeiture of such office. Its decree will not, like the judgment of a court of law, operate in rem, and remove or oust anyone from an office which he in fact holds. When the object is simply to determine the regularity of an election, or to declare an office to which anyone has been duly elected, forfeited, a court of law is the proper and only competent tribunal. So it is the only proper tribunal to recover the possession of lands, or authoritatively to settle and declare the title in real or possessory actions. Yet when the object is to protect lands from waste or destruction, to compel the specific performance of a contract, or to exercise any other power over them vested in the court of equity, it may inquire and determine as to the title. Here, the allegations that Jones and Carpenter obtained the positions they claim by breach of trust, fraud, and breach of agreement, gives this court jurisdiction in the matter for the purpose of restraining the breach of trust and any acts of such breach that may work irreparable injury, and for the purpose of compelling them specifically to perform their contract. This could be done, even if the election held in such breach of trust had been conducted according to law, and would not be set aside by courts of law. If the question of the legality of an election, or whether a certain person holds such an office, arises incidentally in the course of a suit of which equity has jurisdiction, that court will inquire into and decide it, as it would any other question of law or fact that arises in the cause. But the decision is only for the purpose of the suit; it does not settle the right to the office, or vacate it if the party is in actual possession. * * * In this case, Johnston, Parker & Williamson, with Jones & Carpenter, were, until March 7, 1872, de

44—Einstein v. Rosenfeld, 38 N. J. Eq. 309 (1884).

45—Fuller v. Hollander & Co., 61 N. J. Eq. 648 (Court of Errors & Appeals, 1900).

46—Owen v. Whittaker, 20 N. J. Eq. 122 (1869).

facto directors of this company, had control of the charter and corporation, had the books and minutes, had control of the property, and were constructing the road. The defendants contend that on that day an election was held that displaced them, and put the corporation in their control and made them directors. To sustain this defence they must show either a legal election that ought to put them in possession of the offices, or that they are de facto the directors and the corporation.

"This court, to determine the sufficiency of this answer to dissolve this injunction, must determine these questions. A mere answer that they were the directors, without setting out the facts that made them such, would not be sufficient. When these facts are set out, if they do not, in law, constitute them directors, either de jure or de facto, the equity of the bill is not answered. * * * An election thus conceived in fraud and conducted contrary to law, cannot create directors de jure. There is nothing to constitute them officers de facto. Their meeting together, electing officers, procuring new books and voting that they were the books of the company, cannot constitute them such. Johnston, Williamson & Parker, in fact, remain in their offices, and, as a majority, constitute the board of directors, and have the right to use the name of the corporation in this suit. They have possession of the books, of the funds, and of the works of the corporate property, and are clearly the corporation de facto."⁴⁷

A court of equity has no jurisdiction, in a direct proceeding for that purpose, to determine whether an election of the directors of a private corporation has been legally held, and whether certain persons claiming to be and acting as such, are such.⁴⁸

The case of *Owen v. Whitaker*, 20 N. J. Eq. 122, was approved and followed. "In the subsequent case of *Johnston et al v. Jones et al.*, Chancellor Zabriskie reiterates, with emphasis, the doctrine declared by him in *Owen v. Whitaker*, and discriminates between the cases in which the jurisdictional foundation is laid simply in the averment of a disputed election, as in the instance we are now considering, and that other class in which such question comes in collaterally in the determination of matters over which equity has direct cognizance. The distinction is indisputable, and is recognized in every authority that has been noticed, and is nowhere more plainly declared than in the cases just cited. After repudiating, in express terms, the theory that a court of equity, in a direct procedure for that purpose, can inquire into the question of the right to an office, or as to the regularity of a corporate election, the very able chancellor then proceeds to set out the ground on which he vindicates his right to take charge of the controversy. He says: "That the defendant obtained an office claimed by him in a corporation by an election procured to be held by him by fraud, by breach of trust and a positive agreement, by concealment and treachery,

⁴⁷—*Johnston v. Jones*, 23 N. J. Eq. 216 (1872).

⁴⁸—*Kean v. Union Water Co.*, 52 N. J. Eq. 813 (Court of Errors & Appeals, 1894).

confers on a court of equity jurisdiction to inquire into the validity of such an election, for the purpose of restraining the acts of the defendant and other persons claiming office by such election. That equity had jurisdiction of the question of the legality of one of these elections, where such question arises incidentally to the decision of fraud, a breach of trust will be denied by no one versed in the law; and this is what this particular case enunciates, but how such a doctrine has any tendency to support the hypothesis in which the present decree has been rendered is not apparent.' This view of the law on this subject, thus expressed by Chancellor Zabriskie, has received the weighty approval of the late Vice-Chancellor Van Fleet. In the case of *Mechanics' National Bank of Newark v. Burnet Mfg. Co.*, 32 N. J. Eq. 238, this very distinguished jurist says: 'A court of equity has no jurisdiction to pass upon the validity of the election of the officers of a private corporation and pronounce judgment of amotion against them. (*Owen v. Whitaker*, 20 N. J. Eq. 122.) But where the question of the right or power of an officer to represent or bind a corporation arises incidentally in the course of a suit, of which this court may properly take cognizance, and it becomes necessary to look into the legality of his election and the validity of his title, in order properly to determine the rights of the parties, this court will pass upon his title and capacity, as it would upon any other question of law or fact necessarily arising in the due determination of an action.' In the opinion of this court the jurisdictional rule is properly and accurately delineated in the decisions there referred to."⁴⁹

The power to inquire into and adjudicate upon the validity of an election of officers by both municipal and private corporations is, by the constitution, vested solely in the supreme court of this state, and the legislature has no power to vest any part of that judicial jurisdiction in any other tribunal, and it was held that a statute (P. L. 1899, p. 563) conferring jurisdiction in such cases upon the court of chancery was unconstitutional.⁵⁰

The court of chancery upon a preliminary hearing where the facts are practically undisputed, and where a final hearing would be but a repetition of the preliminary hearing, grants relief even in cases requiring a mandatory injunction.⁵¹

A preliminary injunction is never granted, however, unless the act threatened to be done will inflict an irreparable injury on the complainant. Nor will the writ be issued where the right of the complainant depends on an unsettled question of law. Also, it is the general rule that when the equity of the complainant is disproved by the answer and affidavits, a preliminary injunction is not proper.⁵²

49—*Kean v. Union Water Co.*, 52 N. J. Eq. 813, 818 (1894).

50—*Goldstein v. Ewing*, 62 N. J. Eq. 69 (1901).

51—*National Docks Ry. Co. v. Pennsylvania R. R. Co.*, 54 N. J. Eq. 10 (1895); *O'Hara v. Nelson*, 71 N. J. Eq. 161 (1906).

52—*Citizens' Coach Co. v. Camden Horse R. R. Co.*, 29 N. J. Eq. 299 (Court of Errors & Appeals, 1878).

When public interests, or the rights of large classes are involved, an injunction will not be granted, except upon hearing and notice, and then only when it appears clear that the injunction will not prejudice some public or quasi public interest.⁵³

Nothing short of threatened destruction of property of great value, by acts of wanton lawlessness, inflicting injuries which, if not prevented, must result in irreparable damage, while justifying the granting of an injunction staying an important public work, such as the construction of an elevated railroad and the vacation of a street therefor.⁵⁴

A preliminary injunction is properly refused when there exists no reasonable ground for apprehending that the injury against which it is sought will be attempted. When the matter set forth by the complainant as the ground for the interposition of the court does not show an improper or illegal purpose, an injunction should be refused.⁵⁵

"The injunction, it is contended, was granted without notice, and therefore irregular. There is no general rule on this subject; but the operations of large companies should not be suddenly stopped without an opportunity of being heard; and it has been usual for the court to cause notice to be given, except in very plain cases, or where there was a pressing necessity for immediate action. There is a discretion which the court must exercise in every case. If the operation of this injunction had been entirely to prevent the company from working their mines, I should have been inclined to set it aside, on the ground that there was not a case of pressing necessity, and that the defendants were entitled to notice."⁵⁶

"But it is a matter resting in the sound discretion of the court, and must necessarily be so, that the ends of justice may be effectually answered. A short delay may, in some instances, be sufficient to consummate the injury, and place the whole matter out of the reach of the preventive remedy of the court. In the case of *Tichenor v. The Morris Canal & Banking Company*, where a plain and open encroachment was set out in the bill, an injunction was ordered without notice. The very fact, that in every other instance where notice has been given, it has been done under the order of the court, is the best evidence to show that there is no positive rule on the subject."⁵⁷

Where the complainant in an injunction bill relies on his own oath, the charges in the bill, and the affidavit to verify them, should be direct and positive. They must not be such as can only be made sufficient by the aid of presumption. In all cases of waste or nuisance it

53—*Society for Establishing Useful Manufactures v. Butler*, 12 N. J. Eq. 498 (Court of Errors & Appeals, 1859).

54—*Roberts v. West Jersey & Seashore R. R. Co.*, 72 N. J. Eq. 326 (1907).

55—*Odlin v. Bingham Copper & Gold Mining Co.*, 64 N. J. Eq. 363 (Court of Errors & Appeals, 1901).

56—*Capner v. Flemington Mining Co.*, 3 N. J. Eq. 467 (1836).

57—*Perkins v. Collins, et al.*, 3 N. J. Eq. 482 (1836).

must appear clearly that the party has personal knowledge of the material facts charged, or he must produce supplemental proof.⁵⁸

The provisions of sec. 112 of the Chancery Act of 1902, do not repeal or modify the effect of Rules 118 and 150, which forbid the issue of process of injunction upon a final decree until after the expiration of ten days from the filing of the decree. During said ten days no process of injunction on a final decree can issue, except on an order of the court. After appeal taken from such a decree, no process of injunction can issue, except on an order of the court. On application for an order directing such process to issue, if it appears on the face of the proceedings or is otherwise made to appear that such process would destroy the subject matter of the litigation and leave nothing but an abstract question to be passed upon by the Court of Errors and Appeals, the order should be refused. If, after any such order directing the issue of such process, the defendant conceives that it would have the effect above mentioned, he may apply for an order to suspend or modify the operation of the process under section 112 of the Chancery Act of 1902.⁵⁹

A company incorporated to supply water power to the community for manufacturing purposes has a quasi public character; it to some extent becomes the trustee of the power for great public purposes, and on this account a court of equity will not enforce, by injunction, a contract entered into by them which would prevent them from furnishing water with regularity to a large number of their lessees. The remedy for breach of such contract is at law.⁶⁰

An injunction will not be granted to compel a common carrier to transport goods at the rates fixed by law; but it will issue to prevent a railway company, bound by law to transport goods, from entering into an agreement not to transport them at the rates fixed by law.⁶¹

In *Avery v. Blees Mfg. Co.*, 27 N. J. Eq. 412 (1876), the bill was filed for relief against fraudulent acts of a board of directors, alleged to be unlawful, and to have existed merely by usurpation. The property of the company requiring to be preserved pending the litigation, and the conduct of the president and his associates in the direction having been such that they could not be permitted to retain control of the affairs of the company, a receiver was appointed.

86. MODE OF CORPORATE ACTION IN GENERAL.

The directors of a corporation cannot separately and individually give their consent in such a manner as to bind the corporation.¹

58—*Perkins v. Collins, et al.*, 3 N. J. Eq. 482 (1836).

59—*Laird v. Atlantic Coast Sanitary Co.*, 73 N. J. Eq. 5 (1907).

60—*Society for Establishing Useful Manufactures v. Butler*, 12 N. J. Eq. 498 (Court of Errors & Appeals, 1859).

61—*Rogers Locomotive & Machine Works v. Erie Ry. Co.*, 20 N. J. Eq. 379 (1869).

1—*Demarest v. Spiral Riveted Tube Co.*, 71 N. J. L. 14 (1904). See also *Audenried v. East Coast Milling Co.*, 68 N. J. Eq. 450 (1904).

"There are instances where a board of directors may bind themselves, or accept of a contract, by a tacit and implied assent. (12 Wheat. 83, Bank U. S. v. Danbridge.) These cases rest upon the obvious principle, that the law will not sanction the fraud of a corporation, sooner than that of an individual. There must be something that will amount to legal fraud."²

"Inasmuch as a corporation cannot act personally, responsibility for negligence cannot exist unless it is held for an act of some agent or employe. Without a voice of its own, it must speak through another. Inanimate, and without capacity to act by itself, its functions must be performed, and its obligations to its agents discharged through some representative, whose act is its act, whose control is its control, and whose negligence is its negligence. The board of directors, the president—everyone in employment, from the highest to the lowest—is an agent and servant of the company. The purchase of materials and appliances, the employment and discharge of men, must be done by agents. Corporate powers can be exerted, and corporate duties performed, in no other way. Unless absolute immunity is granted to a corporation, there must be some executive officer who stands in the place of the principal, representing him and charged with his duty." And it was held that a corporation is liable to its servant for the negligence of its president, who is its chief executive officer, in the discharge of those duties which the corporation owes to its servants. In that case, the negligence of the president is the negligence of the company itself.³

"Since a corporation must, in general, act by agents, it is evidence that when it becomes an employer of men there will exist some agent, who, in respect to its duties to the employed, will be the representative of the company. While, however, it may be necessary for such corporations to act in these respects by agents, the relation between them and such agents will be identical with that between an individual employer and such agents voluntarily employed, and the rules governing the relation will be alike."⁴

A director, as such, has no authority to act for the company except in his place as a member of the board of directors.⁵ Nor does the fact that he owns a large majority of the corporate stock enable him to bind the corporation.⁶

And the fact that a corporate officer owns nearly all of the stock does not entitle him to contract for the corporation outside of the course of its ordinary business.⁷

2—*Leggett v. N. J. Manufacturing, etc., Co.*, 1 N. J. Eq. 541 (1832).

3—*Smith v. Oxford Iron Co.*, 42 N. J. L. 467 (1880).

4—*O'Brien v. American Dredging Co.*, 53 N. J. L. 291 (1891).

5—*Titus v. Cairo & Fulton R. R. Co.*, 37 N. J. L. 98 (1874); *Demarest v. Spiral Tube Co.*, 71 N. J. L. 14 (1904).

6—*Clement v. Young-McShea Amusement Co.*, 70 N. J. Eq. 677 (Court of Errors & Appeals, 1906).

7—*Demarest v. Spiral Riveted Tube Co.*, 71 N. J. L. 14 (1904).

A corporation may act through its officers or agents pursuant to authority conferred by parol, and such authority may be inferred from circumstances or implied from the acquiescence of the corporation or its managers in a general course of business.⁸

It is a general rule that where a statute authorizes or requires the doing of an act by a person or his agent, as for example, the making of an affidavit or acknowledgment, a corporation may do such act by an officer or agent.⁹

In *Trenton Bank v. Haverstick*, 11 N. J. L. 171 (1829), Chief Justice Ewing said: "But a construction of the act respecting attachments, would be unsound and indefensible and entirely inconsistent with the intention of the legislature, which should preclude a corporation from suing out a writ of attachment; as must be the result, if the act be so construed as to require the affidavit from the corporation itself, or to deny the use of the writ without such affidavit. The law which gives its existence to the corporation, which allows it to sue and be sued, necessarily confers on it the authority to perform, by its agents, by whom alone it can act, incidental services like that in question. The affidavit may be made, or the right of the corporation to sue must be unreasonably narrowed, by a person acting in this respect under the authority of the corporation, and possessed of the requisite knowledge to make such an affidavit as the law prescribes. In general, there is a manifest propriety in the making of such affidavits by the cashier or president, or one of the acting clerks of the bank, because acquainted by the duties of their stations with its pecuniary affairs, and of course with its creditors and debtors. But they are, and act in so doing, as the agents of the corporation. And the agent or attorney of the bank, though not one of those officers, when he acts under the authority of the bank, and has the requisite information, is within the reason and principle of the rule which will allow the affidavit to be made by a cashier or clerk. The present affidavit appearing on the face of it to have been made by an agent of the bank; to show which the oath of the deponent is *prima facie* sufficient; and containing the matters required by the 26th section to be placed in the affidavit, ought to be sustained."

In *Hopper v. Lovejoy*, 47 N. J. Eq. 573 (Court of Errors and Appeals, (1890)), it was held that under the "Act Respecting Conveyances," the deed of a corporation aggregate may be lawfully acknowledged by the representative of the corporation having authority to execute the deed on its behalf. It was held, therefore, where a certificate of acknowledgment stated that there personally appeared before the commissioner, the president of the company, "who, I am satisfied, is the grantor in the within deed of conveyance named, and I having first made known to

⁸—*Crossley v. St. Philip Neri*, 74 N. J. L. 653 (Court of Errors & Appeals, 1907).

⁹—*American Soda Fountain Co. v. Stolzenbach*, 75 N. J. L. 721 (1908).

him the contents thereof, he did acknowledge that he signed, sealed and delivered the same as his voluntary act and deed and as the voluntary act and deed of the company," etc., that the instrument was entitled to be regarded as being acknowledged in accordance with the Act Respecting Conveyances.

And in *Steamboat and Canal Co. v. Thos. Baldwin*, 14 N. J. L. 440, it was held that where a statute requiring an affidavit on appeal to be made by the party demanding the appeal, an affidavit made by the President, Secretary or other proper officer, or agent of a corporation, where the corporation is a party to the suit, is, in legal contemplation, an affidavit made by the party.

Under the attachment act of 1901 the affidavit upon which a writ of attachment may lawfully issue without judicial order must appear to have been made by the plaintiff, his agent or attorney. In the case of a corporation the affidavit should be made by a person acting in that respect under the authority of the corporation and possessed of the requisite knowledge to make such an affidavit as the law prescribes. The authority of the Secretary of a corporation is defined in the general corporation act as "to record all the votes of the corporation and directors * * * and perform such other duties as shall be assigned to him." The Supreme Court held in *North Penn Iron Co. v. Boyce*, 71 N. J. L. 434 (1904) that in the absence of a special assignment, the authority thus defined does not extend to the making of an affidavit upon which litigation is to be instituted. It was held that it is necessary that the affidavit should appear to have been made by "the plaintiff, his agent or attorney."

In *Reed v. Helois Carbide Specialty Co.*, 64 N. J. Eq. 231 (1902) it was held that a corporation mortgage which was executed under the hands of the executive officers of the company and attested by its corporate seal, which was delivered to the mortgagees, and for which valuable consideration passed to the company "coincidentally with its delivery," would not be held to be invalid, because there was no proof that a resolution of the board of directors was passed authorizing and directing the making of the mortgage. In such cases in the absence of proof that it was unauthorized, it will be presumed that it was authorized.¹⁰

There is no statutory authority for the appointment and delegation of the powers of the board of directors to an executive committee, finance committee or other like committee of the directors. In the large companies this is the usual mode by which the ordinary affairs of the corporation are managed.

As to delegation of powers of directors to committees, in general, see *Salem Iron Co. v. Lake Superior Consol. Iron Mines*, 50 C. C. A. 213, 112 Fed. 239; *Metropolitan P. & T. Co. v. Domestic T. & T. Co.*, 44 N. J. Eq. 568 (Court of Errors & Appeals, 1888).

¹⁰—See also *In re West Jersey Traction Co.*, 59 N. J. Eq. 63 (1900).

87. REPRESENTATION OF CORPORATION BY OFFICERS AND AGENTS; EXPRESS OR IMPLIED AUTHORITY BY VIRTUE OF STATUTES; ACTUAL AND IMPLIED AUTHORITY IN GENERAL; PRESUMPTION OF AUTHORITY; ACQUISITION IN RESPECT TO UNAUTHORIZED ACTS; RULES OF EVIDENCE.

The powers of the officers of a corporation over its business and property are strictly the powers of agents—powers either conferred by the charter or delegated to them by the directors or managers, in whom, as the representatives of the corporation, the control of its business and property is vested.¹

“This leads to the important inquiry, how far these incorporated companies are bound by the acts of their agents. Upon this subject, it was earnestly contended on the part of the complainants that, in this instance, the president and cashier being recognized as the agents and servants of the corporation, and being intrusted with the care of the corporate seal, their acts should bind the corporation, provided they were such acts as the corporation itself might lawfully do or order to be done: that within this limit strangers or third persons are not bound to inquire whether the mode of doing the acts was according to the internal regulations of the company or not. There is much plausibility in the argument; and considering that incorporations are fast spreading over the land, and mingling themselves with all the ordinary concerns of life, it may afford matter for profitable inquiry to those whose province it is to create these impersonal and artificial bodies. But the rule of law appears to be settled on this subject, and it is not for me to alter it. It is this: that corporations, like natural persons, are bound only by the acts and contracts of their agents, done and made within the scope of their authority. * * * Taking this as the true principle, it is incumbent on the defendants to satisfy the court that the president and cashier acted beyond their authority. They acted either as general or special agents; or in other words, either in virtue of their general power, *ex officio*, or of some special authority. If in virtue of their general power as officers of the bank, they exceeded it, in undertaking to convey the real property of the corporation. The cashier is usually intrusted with all the funds of the bank, in cash, notes, bills, etc., to be used from time to time for the purposes of the bank. He receives directly, or through the subordinate officers, all moneys and notes. He draws checks, from time to time, for moneys, wherever the bank has deposits. In short, he is the executive officer through whom, and by whom, the whole moneyed operations of the bank, in paying or

1—Fifth Ward Savings Bank v. First National Bank, 48 N. J. L. 513 (Court of Errors & Appeals, 1886); Stokes v. New Jersey Pottery Co., 46 N. J. L. 237 (1884); Titus & Scudder v. C. & F. R. R. Co., 37 N. J. L. 98 (1874); S. C. 46 N. J. L. 393, 418 (1884).

receiving debts, or discharging or transferring securities, are to be conducted. It is, perhaps, more difficult to define with precision the powers of the president of a bank; but I believe it may be said with safety, that they are not so important as those of the cashier. He is the president of the board of directors, but as such does not possess the powers of the board. He is a member of the board, and in the absence of that body is intrusted with the general supervision of the concerns of the bank."²

"It is unquestioned law that a corporation must respond for the acts of its agents in the conduct of its business, which are injurious to others, though they may be wholly unauthorized by the corporation, indeed forbidden by it, as in the case of railroad train operatives who, while driving trains, injure passengers or travelers of highways in breach of the company's rules, and the many negligence cases which arise in the conduct of the business of railroad, steamboat, ferry and other corporations. These acts are done, perhaps, by day laborers and are not beneficial to the company or in any ratified or approved by it. The company answers for these wrongdoings, because it has put the wrongdoers in its place to do its business, and it must respond for the wrong so done to other persons in the course of its business. I can see no reason why the corporation should not respond, at least, to the extent of restoration in cases where the officers and agents of the company perpetrate a fraud in the conduct of its business, and thereby induce the making of a contract which the company accepts and executes, and of which it retains the benefit."³

"If the corporation has clothed the agent with the power to act in its behalf, and receives and accepts the benefits resulting from his agency, then the parties injured by the fraud may resort for redress to the principal. But it is no answer to say the corporation could not authorize an agent to perpetrate a fraud, because if this were so no corporation could be held liable for any acts of its authorized agents, however great the injury to others. This liability of the company is stated to attach not on the ground of express authority given by the corporation to its agent to make the statement, but because the corporation cannot act save through its agents, and as to the particular matter the agent stands in the place of the principal, and whatever he does or says about that matter is the act or saying of the principal. The execution by the corporation of the resulting contract and the retention of its benefits after knowledge of the fraud, is not only a ratification of the contract itself, but also an adoption of the statements of the company's agents whereby the contract was obtained. It is unconscionable that the corporation principal should be permitted to keep the results of a fraud by merely denying the authority of its agents to perpetrate it."⁴

2—*Leggett v. N. J. Manufacturing, etc., Co.*, 1 N. J. Eq. 541 (1832).

3—*Garrison v. Technic Electrical Works*, 55 N. J. Eq. 708, 718 (1897).

4—*Garrison v. Technic Electrical Works*, 55 N. J. Eq. 708, 718 (1897).

"It is also conceded that a master may employ and put in his place a representative, for whose negligence occasioning injury to a servant, also in his employ, he will be liable. The rule thus conceded has been applied by our courts only in the case of *Smith v. Oxford Iron Co.*, 42 N. J. L. 467. The question there was, whether an incorporated company was liable to an injured servant whose injury was occasioned by the neglect of its president. The case showed that the superintendence of the business of the company had been committed to its president. He introduced the use of a highly dangerous explosive without instructing the workmen directed to use it in respect to its dangerous qualities. This court held that under such circumstances a duty devolved on the company to give notice of the qualities of the explosive, a failure to perform which would be negligence, and that, having entrusted to its chief executive officer the superintendence of its business, it became his duty to give the required information, and his failure or neglect in that respect was imputable to the company and rendered it liable to its servant injured in the use of the explosive. The superintendent of the business was thus held to be, in respect to this duty owed by the company to its servants, a representative of the company, whose negligence was its negligence."⁵

"A corporation engaged in publishing a newspaper obviously must act by selected agents. Its directors or managers cannot formally pass on each publication or determine what is to be admitted therein. Such determination is necessarily committed to its agents. In making such determination they are acting within the scope of their employment. The intent with which they publish must be imputed to the corporation which employs them to make the publication of the newspaper. If the intent is malicious, the corporation must be liable therefor as it is for other tortious acts of its agents done within the scope of their authority and for the purposes for which the corporation was created and the agents were employed."⁶

A corporation cannot evade liability on a contract made by its general manager, upon the ground that the making of the contract was not within the scope of his powers, when it appears that the contract was made by him in pursuance of specific instructions from the vice-president and managing director, each having full power to confer upon him such authority.⁷

A corporation, organized to construct and manage a hotel, employed its secretary to manage the details of the work of construction. He employed a contractor to install a kitchen equipment. While the work was being done, the president of the corporation was in frequent attendance, and the equipment was accepted by the corporation when it subsequently started in business. It was held that the equipment was

5—*O'Brien v. American Dredging Co.*, 53 N. J. L. 291, 293 (1891).

6—*Hoboken Printing Co. v. Kahn*, 59 N. J. L. 218 (Court of Errors & Appeals, 1896).

7—*Stuart v. Staten Island Clay Co.*, 65 N. J. L. 546 (1900).

ordered by competent authority, entitling the contractor to a lien. "It is true that no formal resolution of the board of directors appears on the company's minutes expressly making and authorizing this particular contract. It also appears by its minutes that there was no meeting of the company's directors after the first one, until long after the whole finished building had been erected, accepted and in actual use by the company. No formal action of the board was necessary to obligate the company where it conclusively appears that its authorized officers acted, and that the work thus induced was accepted by the company."⁸

Thus it was held that where an agent of a water company was in charge of the work of building a dam, with power to hire and discharge help and fix their wages, a mere employe is not bound by a limitation on such power that whenever a question was raised as to wages the matter was referred to the executive committee, he having no knowledge of such limitation.⁹

"The same principle, that a general agency to do a particular act (e. g., to endorse paper and make loans) may be created by a holding out to the world, is also recognized in our own decisions. In *Fifth Ward Savings Bank v. First National Bank*, 18 Vr. 357 (New Jersey Supreme Court, 1885), the treasurer of the plaintiff, a savings bank, obtained a loan of the defendants in the name of the plaintiff and ostensibly for its use, pledging securities of the savings bank for its repayment. The treasurer fraudulently misappropriated the funds to his own use, and the savings bank brought an action of trover for the value of the securities. On verdict for the plaintiff and application for a new trial, Chief-Justice Beasley said (at p. 358): The treasurer not having express power to make the loans or pledge the bonds, 'the only open point of inquiry on this question was whether or not the plaintiff had put its treasurer in such an attitude before the public or before the defendant as to have warranted a reasonable inference that he was its general agent, and had the right to execute the transaction in question.' In this same case on error (*Fifth Ward Savings Bank v. First National Bank*, 19 Vr. 513 (Errors and Appeals, 1886), Mr. Justice Depue, delivering the opinion of the court, said (at p. 527) that 'when, in the usual course of a business of a corporation, an officer has been permitted to manage its affairs, his authority to represent the corporation may be implied from the manner in which he has been permitted by the directors to transact its business, and that, in such cases, the authority of the officer does not depend so much upon his title, or on the theoretical nature of his office, as on the duties he is in the habit of performing.'

"The careful and precise statement in the above case by the learned chief-justice of the question to be left to the jury in such cases distinguishes, it will be noticed, between the holding out to the world

⁸—*Porch v. Agnew Co.*, 70 N. J. Eq. 328 (1905); affirmed 71 N. J. Eq. 305 (Court of Errors & Appeals, 1906).

⁹—*Kelly v. Jersey City Water Supply Co.*, 74 N. J. L. 734 (Court of Errors & Appeals, 1907).

and the holding out to the defendant, and this distinction, as it seems to me, touches directly one of the questions now involved, viz., whether the general agency in such cases arises from estoppel. If there was a holding out to the defendant, but not a holding out to others or to the public as well, then the agency in such case might well be said to depend upon the estoppel of the principal to deny the agency which he had held out to the creditor and which the creditor had relied on. But it is clear, I think, that in commercial transactions, which must be carried on largely by means of general agencies to do particular acts, there is an agency which is created by the general and public exercise of an authority with the permission of the principal, and where this general agency, in fact, exists as arising from this source, it is not necessary for the creditor to show further that it was previously known to him and that he acted in reliance on it. Where the agency is a general agency provided by the continued exercise of the authority toward the public by the permission of the principal, and there is an estoppel to the public, the law presumes that the public knew of the holding out by the principal and acted on it.

"The principle of technical estoppel as between parties is not at all involved in such cases, and, as it seems to me, could not be, for the reason that an estoppel of the principal toward the third person dealing with the agent must depend upon the representation by the principal made to the creditor. A representation to others could not, generally speaking, give rise to a technical estoppel at all, and the holding out to others or to the public, if it is to have any legal basis at all, must be by creating of itself and wherever it is proved to exist a general authority as to the public for the particular act. For this reason, as it seems to me, the distinction as stated by the chief-justice must be taken as the true one, viz., whether the holding out as general agent is to the public or to the particular dealer only. If the latter only, estoppel is the basis, but not in the former cases. * * * In a late decision of the court of errors and appeals (*Camden Fire Insurance Co. v. Jones*, 24 Vr. 189 [Errors and Appeals, 1890]), a certificate of stock was signed in the principal's name, and was accepted by the assignee, supposing that the signature was, in fact, the principal's signature. The trial judge overruled evidence of numerous acts by the agent for the principal with other persons, offered by the assignee for the purpose of showing that the agent was, in fact, authorized, as the general agent of the principal, to make this assignment of stock. The reason for overruling the evidence was that the assignee had not relied on the agency. All of the judges agreed that the refusal to admit the evidence was error, if the evidence was sufficient to show the agency, in fact, to make the transfer, and they differed only as to the effect to be given to this evidence. The decision seems to be a direct and controlling authority to the point, that the powers of an agent may be proved by the exercise of previous acts with other persons, with the permission of the principal, and that, if these previous acts establish, or tend to establish, the agency, not only

is not actual reliance on them in the transaction in question not required to be proved, but this agency arising from this source may be established and relied on at the trial, even if the contract in question was not supposed to be a contract of the principal by an agent, but a direct contract of the principal himself. A similar conclusion as to the effect of proof of general agency was reached in the early case of *Williams v. Mitchell*, 17 Mass. 98, where a sale was made upon the faith of an express written authority to buy, apparently executed by the principal, but which was forged by the supposed agent. It was held that, notwithstanding the express reliance of the vendor on this forged authority alone, he could show the agent was, in fact, a general agent to purchase goods for the principal, and recover on the proof of such authority, although this fact of general agency has not been relied on or even known. The doctrine is established beyond question that where any particular officer of a corporation, with the knowledge and assent of the directors, is held out to the public as having authority to endorse its regular business paper, such holding out to the public creates the authority for the purpose, and in the great mass of cases enforcing this rule the application of the rule is not limited to cases where it can be shown that the paper was received with actual knowledge of the previous holding out and in reliance on it."¹⁰

Where a corporation's treasurer is made its general agent for the endorsement of paper, by reason of the acquiescence of its directors in numerous endorsements made by him while holding himself out to the public as having authority so to do, an endorsement made by him is binding on the corporation, though the endorsee had no knowledge of the previous endorsements.¹¹

"There are undoubtedly, instances to the effect that a corporation will not be allowed to gainsay the acts of their officers on the pretext of a want of competency to do the particular act in question. But this rule obtains only when the authority which is challenged depends upon the existence of facts extrinsic of the charter, the knowledge of which is accessible only to the corporators, and which are not known to the party dealing with the corporation. And it may also be doubted whether the principle is ever applicable except when the officer who ostensibly gives the assent of the company to any transaction, is the general agent of the corporate body. But this defence, that the officer has done an act in contravention, or in excess of the chartered right, will not be permitted to prevail when the person in whose favor such act has been done, is presumed to have been ignorant of such transgression."¹²

Where a mortgage by a corporation was duly executed and recorded before a judgment was obtained by a creditor under which the mortgaged property was sold, and the corporation had the full benefit of the bonds which the mortgage was given to secure, the fact that the di-

¹⁰—*Blake v. Domestic Manufacturing Co.*, 64 N. J. Eq. 480 (1897).

¹¹—*Blake v. Domestic Mfg. Co.*, 64 N. J. Eq. 480 (1897).

¹²—*Beasley, C. J.*, in *Morrison v. Inhabitants of Township of Bernards*, 36 N. J. L. 219, 223 (1873).

rectors in the corporation who were substantially the sole owners of its property, held the meeting at which the mortgage was authorized in another state, which fact did not appear from the mortgage, did not render it void as to such judgment creditor. Vice-Chancellor Pitney said: "I do not deem it necessary to go into the learning of the law upon the subject of the power of a corporation of this state to hold a meeting of directors out of the state where the by-laws do not, as they do not in this case, provide for meetings of the directors out of the state. Much might be said in favor of the position that, if such action is unwarranted by the strict rules of law, it can only be taken advantage of by some member of the corporation by means of a direct proceeding for that purpose. Here the action was taken substantially by the sole owners of the corporate property. The corporation had the benefit of the bonds issued under that mortgage; and, under those circumstances, the law is sufficiently settled in this state that the mortgage is valid and binding upon the corporation; and, if valid and binding upon the corporation, then it is good against a judgment creditor of the corporation who had notice, by the record, of its existence.

"The public who take and pay for the securities so issued are entitled to presume that all necessary preliminaries, not required to be a matter of public record, have been properly performed. 7 *Thomp. Corp. Secs.* 8317, 8321, 8322. In this case the defect relied upon does not appear on the face of the mortgage, and there is nothing shown in the case which would have put the investors on inquiry as to it. It would, in my judgment, be a most dangerous doctrine to hold that a corporation may be permitted to solemnly execute a mortgage and divers bonds secured thereby, and set to each its corporate seal, and record the mortgage, and issue to innocent holders its bonds for value received, and, after having received value therefor, set up that there never was any resolution of the board of directors authorizing the making of that mortgage and the issuing of those bonds. *Hackensack Water Co. v. DeKay*, 9 *Stew. Eq.* 548, headnote 8. At p. 566 the learned judge who spoke for the court of errors and appeals says: "In the courts of this country it may also be considered as settled law that * * * where the corporation has power, under any circumstances, to issue negotiable securities, a bona fide holder has a right to presume that they were issued under the circumstances which give the requisite authority; and they are no more liable to be impeached for any infirmity in the hands of such a holder than any other commercial paper. And see *Kuser v. Wright*, 7 *Dick. Ch. Rep.* 825." ¹³

It is not necessary that there should be a meeting of directors preceding the issuing of each note made by a corporate officer and a resolution passed by the board authorizing the making of the note. Such authority may be inferred from the customary exercise by the officer of such authority in the signing of notes issued in the name of

¹³—*Schultze v. Van Doren*, 64 N. J. Eq. 465 (1903); affirmed 65 N. J. Eq. 764 (Court of Errors & Appeals, 1903).

the corporation and from the recognition of such notes by the act of the corporation in paying them.¹⁴

"The appellant claims a preference upon the funds in the hands of the receiver by reason of five assignments of account due the insolvent corporation and collected by the receiver. Four of these accounts were due at the time of the assignment; one was for money not yet earned. The resolution of the board of directors which is relied on as authorizing the assignments, empowered the president and treasurer to borrow money of the Coal & Ice Company, 'the same to be returned to them out of the first collections following such loans.' This did not authorize absolute assignments, and the right of the appellant must depend upon the general authority of the president. We think this was sufficient to warrant him in collecting money due the company on outstanding accounts, and we see no valid distinction in this respect between collecting the money of the debtor and selling the account for its face value. The result in both cases is the same—book accounts are converted into cash. The first four assignments are valid, and the amount thereby assigned belongs to the appellant. The fifth assignment is of money not yet earned. We find no authority in the president to make that assignment, and the claim of the appellant thereunder is not valid."¹⁵

"There are cases in which the powers of an officer of the corporation and his authority to act for the company are enlarged beyond those powers which are inherent in his office. But those are cases in which the agency of the officer has arisen from the assent of the directors, presumed from their consent and acquiescence in permitting the officer to assume the direction and control of the business of the company. Thus, when, in the usual course of the business of a corporation an officer has been allowed to manage its affairs, his authority to represent the corporation may be implied from the manner in which he has been permitted by the directors to transact its business.

"These are simply instances of the application of the principle that usual employment is evidence of the powers of an agent, and a responsibility will be laid upon the principal for the acts of his agent within the apparent authority so conferred upon the agent—a doctrine which has come to be applied to corporations in many respects as well as to individuals, and with the same qualifications and limitations. In such cases, the authority of the officer does not depend so much on his title, or on the theoretical nature of his office, as on the duties he is in the habit of performing."¹⁶

"The defendants have, then, shown satisfactorily, that the president

14—Crossley v. St. Philip Neri, 74 N. J. L. 653 (Court of Errors & Appeals, 1907).

15—Cogan v. Conover Mfg. Co., 69 N. J. Eq. 816 (Court of Errors & Appeals, 1906).

16—Fifth Ward Savings Bank v. First National Bank, 48 N. J. L. 513 (Court of Errors & Appeals, 1886); Stokes v. New Jersey Pottery Co., 46 N. J. L. 237, 242 (1884).

and cashier of the New Jersey Manufacturing & Banking Company, were not authorized by any previous vote or order of the board to affix the corporate seal to those instruments; that they had no authority to do it in virtue of their offices, or of the direction or approbation of any other lawfully authorized agents of the board. From all which, I am drawn to the conclusion that the bond and mortgage were not lawfully or properly executed by those officers. In coming to this conclusion, I wish to be understood in a legal sense, and not as impeaching the morality of the transaction. There is every reason to believe the mortgage was given in good faith.

"If the view taken of this case be correct, the bond and mortgage were not, at the time of their execution, available as against the corporation, still they were not void in themselves. A corporation may approve of the unauthorized acts of its agents, and make them their own. This may be done directly or indirectly. It may be shown by express acknowledgment or act, or it may be inferred from circumstances. 'By the whole course of decisions in this country, corporations, in their contracts, are placed upon the same footing with natural persons, open to the same implications, and receiving the benefit of the same presumptions.'"¹⁷

In the absence of anything in the act of incorporation bestowing special power upon the president, he has from his mere official station, no more control over the corporate property and funds, than any other director. The affairs of corporate bodies are within the exclusive control of their boards of directors, from whom authority to dispose of their assets must be derived. The act of a president or other officer, unless it is shown to pertain to his official duty, or to be within the scope of his employment, cannot be regarded as the act of the corporation, and is not binding upon it.¹⁸

"The powers of the president of a corporation, *virtute officii*, over its business and property are strictly the powers of an agent—powers delegated to him by the directors, who are the managers of the corporation, and the persons in whom, as its representatives, the control of its business and property is vested. If the corporation be organized for business purposes, the president is its chief executive officer. He may, without any special authority from the board of directors, perform all act of an ordinary nature which, by usage or necessity, are incident to his office, and may bind the corporation by contracts in matters arising in the usual course of its business. To this extent, the president, in virtue of his election as such, becomes the agent of the corporation. Beyond the powers which usage and custom and the necessities and convenience of business require in the executive officer of a corporation, he has no more control over the corporate property and funds than any other director.

17—*Leggett v. N. J. Manufacturing, etc., Co.*, 1 N. J. Eq. 541 (1832).

18—*Titus & Scudder v. Calro & Fulton R. R. Co.*, 37 N. J. L. 98 (1874). See also *Murphy v. Cane, Inc.*, 76 Atl. 323 (1910).

"As illustrative of the restricted powers of a president of a corporation in the management of its business and control over its property, I will refer only to two cases in our own courts. In *Titus v. Cairo & Fulton R. R. Co.*, 37 N. J. L. 98, 102, this court held that a power of attorney executed by the president of a corporation authorizing a sale of its bonds in the market, gave the agent no power to sell, and that the president could not execute such a power without the authority of the board of directors. In delivering the opinion of the court Mr. Justice Van Syckel said: "In the absence of anything in the act of incorporation bestowing a special power upon the president, he has, from his mere official station, no more control over the corporate property and funds than any other director. The affairs of corporate bodies are within the exclusive control of their boards of directors, from whom authority to dispose of their assets must be derived. The act of the president or other officer, unless it is shown to pertain to his official duty or to be within the scope of his employment, cannot be regarded as the act of the corporation, and is not binding upon it. The authority requisite to charge the company must therefore be derived from the board of directors."

"The other case is *Leggett v. New Jersey Banking Co.*, Saxt. 541. In that case the charter of a bank provided that the affairs, property and concerns of the corporation should be managed by its directors; and the Court of Chancery held that, although a mortgage executed under the authority of the board of directors would be valid, a mortgage executed by the president and cashier under the corporate seal without the authority or concurrence of the board of directors, was not a valid instrument.

"The reasoning on which the cases cited were decided applies to the case now before the court. The plaintiff, by his judgment and the execution thereon, has acquired a lien on all the property of the corporation; and I cannot find in principle any distinction between a mortgage or conveyance of the lands of a corporation and a judgment upon bond and warrant of attorney upon which the property, real and personal, of the corporation is taken. Such a transaction is not within the ordinary business of a corporation, which the president, as its executive officer, is, in virtue of his office, authorized to transact. * * *

"Nor can this judgment acquire validity from the fact that the money advanced by the plaintiff was applied for the benefit of the company. From that fact a debt would arise, and an obligation on the part of the corporation to pay the debt in common with its other debts would result; but the plaintiff cannot hold his security which gives him a lien upon the company's property, unless his security is a valid security as an encumbrance thereon, especially when the rights of other creditors are involved. The receiver, as the representative of creditors, has the capacity to take the objection that the security was not made in such a manner as to be binding upon the corporation." ¹⁹

¹⁹—*Stokes v. New Jersey Pottery Co.*, 46 N. J. L. 237 (1884).

The president of a corporation has no power, *virtute officii*, to alter the provisions of a former agreement, under seal, entered into by the corporation itself. The court said:

"We concur in the view of the vice-chancellor that the agreement of the president of the company to modify the provision in the contract relating to the sale of liquor (if such agreement was made by him) did not bind the respondent. No attempt was made to show any express authority conferred upon him for this purpose by the board of directors, and he had no power *virtute officii* to alter the provisions of a former agreement under seal entered into by the corporation itself. The act of the president of a corporation unless it is shown to pertain to his official duty, or to be within the scope of his employment, cannot be regarded as an act of the corporation, and is not binding upon it. *Titus v. Cairo & Fulton Railroad Co.*, 37 N. J. Law, 98. His powers over its business and property are strictly the powers of an agent, delegated to him by the directors, who are the managers of the corporation, and the persons in whom the control of its business and property is vested. He may, without any special authority from the board of directors, perform all acts of an ordinary nature which by usage or necessity are incident to his office, and may bind the corporation by contracts in matters arising in the usual course of business. To this extent, by virtue of his office, he is the agent of the corporation, but beyond this his official position gives him no more control over its property, funds or business, than any other director. *Stokes v. New Jersey Pottery Co.*, 46 N. J. Law, 237. Any act done by him which is outside the scope of the powers which inhere in his office will not bind the corporation, unless it is shown that authority was conferred upon him for the purpose by the directors, either expressly or by their consent and acquiescence in permitting him to assume the direction and control of the business of the company. *Stokes v. New Jersey Pottery Co.*, *supra*. As has already been said, no express power was shown to have been conferred upon the president of the respondent company to alter its formal agreement, executed by it under its corporate seal, and it cannot be inferred from the testimony that such power had been conferred upon him inferentially, by his assumption of the direction and control of the business of the corporation, with the consent and acquiescence of the directors."²⁰

The president of a corporation has no authority, by virtue of his office as president, to execute a *cognovit*. The *cognovit*, in terms is a confession of the action, and the right to give it does not come within the power the president has, as the general agent of the company, to direct and control its business, or where his agency is presumed from the assent of the directors by their consent and acquiescence in permitting him to do this class of acts.²¹

20—*Mausert v. Feigenspan*, 68 N. J. Eq. 671 (Court of Errors & Appeals, 1905).

21—*Raub v. Blairstown Creamery Association*, 56 N. J. L. 262 (1893).

It has been held by the Court of Errors and Appeals that the act of the president of a corporation in ratifying a tortious act committed by the agents of the corporation was the act of the corporation so as to subject it to punitive damages under the rule which holds a master liable to respond in punitive damages for the malicious and wanton act of his servant when that act receives the approval of the master.²²

"Counsel for the banks claim that the treasurer of a manufacturing and trading corporation of this character has the right, by virtue of his office, to endorse the business paper of the corporation and to bind corporation thereby, and the decisions in some states relating to the implied powers of cashiers and treasurers are cited as supporting this contention. But, in my judgment, they do not reach to the extent claimed, and, in view of the general provisions of our statute laws, that the business of the corporation is to be managed by the directors, and the numerous decisions of our courts that the powers of the officers of a corporation are simply the powers of agents delegated to them by the board of directors, I am of opinion that the treasurer of a manufacturing corporation is not, merely by virtue of his office, and in the absence of any authority delegated to him by the directors, authorized to endorse the company's note for discount or sale. Such delegation of authority, however, may be made by the directors in other methods than by express resolution; and the claim made here by the banks is that, by the entire method and course of business of the company, adopted by its directors, or under their authority or permission, the treasurer was held out to the public and to the defendants as its general agent for the purpose of endorsing paper of this character, and the company are therefore bound by his endorsements. Such holding out, either to the public or to any of the banks whose claims have been allowed, is denied by the complainants, and is the main question of fact involved in this branch of the case. The evidence relating to this point involves directly the connection and course of business of both companies from the time of their organization, and the principal facts which I find to be established by the evidence are as follows:"

(After examination of facts in case, reported in full in 38 Atl. Rep. 245, 255, the opinion proceeds.)

"I find, therefore, as facts in the case, that from July, 1890, to the failure of the manufacturing company, David Blake, as its treasurer, in fact acted as the agent of the company in the endorsement and discount for its own credit of notes received by it from the Sewing Machine company to the credit of its current account with that company, and that these endorsements and discounts by David Blake were made in such a multitude of instances and to such an extent as to be sufficient to make him the agent of the company for the purpose of endorsing and discounting paper of this character, if an agency for such purpose

²²—*Carey v. Wolff & Co.*, 72 N. J. L. 510 (Court of Errors & Appeals, 1906).

could be constituted by the directors negligently permitting the agent to hold himself out to the world or public." ²³

"Under these cases, (*Hackensack Water Co. v. DeKay*, 9 N. J. Eq. 548; *Wells v. Rahway Rubber Co.*, 19 N. J. Eq. 402), the fact that no notice of the meeting of directors, at which the mortgages were authorized, was given to Bell cannot affect the validity of these securities. That is a subject into which those who are dealing with a corporation are not bound to inquire. That duty falls on the company alone when it holds out its officers as its accredited agents. Nothing like an approach to safety could exist in transactions with corporate bodies if such an obligation was laid upon third parties contracting with them. After the most careful inquiry, the question would still be open to controversy." ²⁴

If a body of men, acting as a corporation, permit certain persons to act openly as corporate officers, or if it is permitted by the directors, assuming them to have had the power to appoint the officer in question, the corporation will not, to the detriment of persons who, in good faith, have acted on the assurance that the persons acting as officers were the officers they assumed to be, be permitted to impeach the validity of their acts and contracts on the ground that such persons were not legally corporate officers.²⁵

In *Bennet v. Millville Improvement Co.*, 67 N. J. L. 320 (1902), the Court of Errors and Appeals quoted with approval the rule laid down in *Cook on Corporations* (Section 716) as follows:

"In all cases the president binds the corporation by his acts and contracts when he is expressly authorized to so act or contract or when he has been permitted by the corporation, for some time, to act and contract for it. Thus, when the president had been accustomed to act and contract for the company without express authority, and his acts had always been accepted, his order to a contractor to stop work binds the company. So, also, the company is bound when it ratifies or accepts the contract after it is made, or accepts the benefit of the contract having knowingly received the benefit of the contract made and carried out by the president, even without authority, the corporation must perform its part."

A lease to a manufacturing corporation gave the privilege of purchasing the land leased, at the expiration of the term. The president was authorized to obtain a correction in the description of the premises. He did, in fact, obtain a new lease thereof, at the same rent for the same term, but the lease omitted the option given to purchase. It was held that the subsequent user of the property by the company, and the

23—*Blake v. Domestic Manufacturing Co.*, 64 N. J. Eq. 480 (1897).

24—*Kuser v. Wright*, 52 N. J. Eq. 825 (Court of Errors & Appeals, 1894).

25—*Taylor on Corporations*, § 187, cited in *Kuser v. Wright*, 52 N. J. Eq. 825 (Court of Errors & Appeals, 1894).

payment of rent, did not show notice to the directors of the contents of the second lease or acquiescence in its provisions; and that even if ratification by acquiescence were to be presumed, the acceptance of the second lease was not a surrender in law of the first lease, or of the term of years thereby created.²⁶

A corporation is liable on an unauthorized endorsement of notes made by its assistant treasurer, where, after such endorsement, the notes were discounted, and it received the discount, which was used in paying its employees.²⁷

"The claims of estoppel and ratification are both barred by a single fact—that the company had no notice, either actual or constructive, that the complainants possessed, or believed they possessed, a lease for a longer term than Young's unwritten authority entitled him to give, or that its own rights, consistent with the proper exercise of his authority, were in anywise infringed. The necessity for such notice as the basis of either estoppel or ratification is clear."²⁸

An entry upon the use and occupation of land under a lease purporting to be made by the agent of the company, and paying rent pursuant to its terms, is sufficient to bind the corporation to the lease. The agent's authority to act may be shown as well by subsequent ratification of his acts as by proof of a previous appointment.²⁹

Where the directors of a company, after an act has been done by an agent of the company, and entered upon their books, acquiesce in such act and proceed in the premises as if it were done by them, they are be bound by it, even if the agent had not authority at the time for the transaction.³⁰

Any incorporated company may ratify the acts of agents, though done without previous authority, if the acts are within the powers of the company.³¹

"It is undoubtedly true that a board of directors to whom the president of a company communicates his action in making a contract for and in the name of a corporation—action which it is within the power of the board to authorize, but which it has not in fact authorized—must

26—*Lister Agricultural Chemical Works v. Selby*, 68 N. J. Eq. 271 (1904).

27—*Blake v. Domestic Mfg. Co.*, 64 N. J. Eq. 480 (1897).

28—*Clement v. Young-McShea Amusement Co.*, 70 N. J. Eq. 677 (Court of Errors & Appeals, 1906); *Kirchner v. Miller*, 39 N. J. Eq. 355 (1885); *Sumner v. Seaton*, 47 N. J. Eq. 103 (1890); *Perkins v. Moorestown & Camden Turnpike Co.*, 48 N. J. Eq. 499 (1891); *Central R. R. Co. v. MacCartney*, 68 N. J. L. 165 (1902); *Gulick v. Grover*, 33 N. J. L. 463 (Court of Errors & Appeals, 1868); *Titus v. Cairo & Fulton R. R. Co.*, 46 N. J. L. 398 (1884); *Annam v. Hill U. B. Co.*, 59 N. J. Eq. 414 (1900); *Dowden v. Cryder*, 55 N. J. L. 329 (Court of Errors & Appeals, 1893); *Schlessinger v. Forest Products Co.*, 76 Atl. 1024 (Court of Errors & Appeals, 1910).

29—*Crawford v. Longstreet*, 43 N. J. L. 325 (1881).

30—*Durar v. Insurance Co.*, 24 N. J. L. 171 (1853).

31—*Metropolitan Telephone Co. v. Domestic Telegraph Co.*, 44 N. J. Eq. 568 (Court of Errors & Appeals, 1888).

disaffirm that action within a reasonable time. If the board does not disaffirm, it will be presumed to ratify. *Indianapolis Rolling Mill v. St. Louis Railroad Co.*, 120 U. S. 256. But knowledge must precede acquiescence. It must, in the words of Chief Justice Morton, in *Murray v. Nelson Lumber Co.*, 143 Mass. 250, be shown 'that the directors, or at least a majority of them, knew of the contract and its terms, and that with such knowledge they acquiesced in and adopted it.'"³²

If a corporation appears to indictment by an attorney of the court, it is not necessary to take proceedings under the statute to secure an appearance. The burden will be on the corporation to show that the appearance by the attorney is unauthorized.³³

Where the facts are clear and undisputed and conclusively show lack of authority in an agent, the question as to his authority in a given particular being the matter in issue, it is the duty of the court to determine the issue by peremptory instruction to the jury; but the contrary is the rule if the evidence be doubtful or conflicting as to a material fact, or if the established facts admit of conflicting inferences determinative of the issue.³⁴

It is a settled rule in this state that agency cannot be proved by a mere declaration of one assuming to act in this capacity. Representations by an agent are therefore not binding upon the principal until proof is made that the agency exists.³⁵

Where, however, no objection is made, hearsay evidence, like any other evidence, is to be considered and given the importance it deserves. A distinction has been asserted between trials before a court alone, and trials before a jury, in respect to the admissibility of hearsay evidence.³⁶

A principal is bound by the acts and concomitant declarations of an agent touching such matters only as are within the scope of his general employment, or have been specially entrusted to his agency by the principal. Acts and declarations not falling within this rule are not within the exception to the rule excluding hearsay testimony. They are admitted in evidence against the principal as representations or acts of the principal himself whom the agent represents, while engaged in the particular business to which the declarations or acts refer. They must constitute a part of the *res gestae* in the course of his employment about the matter in question; they must accompany the doing of

32—*Lister Agricultural Chemical Works v. Selby*, 68 N. J. Eq. 271 (1904).

33—*State v. Passaic County Agricultural Society*, 54 N. J. L. 260 (1892).

34—*American Saw Co. v. First Nat. Bank*, 60 N. J. L. 417 (Court of Errors & Appeals, 1897).

35—*Brounfield v. Denton*, 72 N. J. L. 235 (Court of Errors & Appeals, 1905); *Smith v. Delaware & Atlantic Telegraph & Telephone Co.*, 64 N. J. Eq. 770 (Court of Errors & Appeals, 1902).

36—*State v. McDonald, Coxé* *332; *Smith v. Delaware & A. Tel. & Tel. Co.*, 63 N. J. Eq. 93 (1902); affirmed 64 N. J. Eq. 770 (Court of Errors & Appeals, 1902).

the business or making of the contract and must be within the scope of the delegated authority.³⁷

In *Agricultural Insurance Co. v. Potts*, 55 N. J. L. 158, it was held that a statement made by a general agent of a corporation in the course of his employment as to a fact within his official knowledge touching the statement of a matter entrusted to him is admissible in evidence on behalf of a party with whom the corporation was dealing.

In *Smith v. Delaware and Atlantic Telegraph & Telephone Company*, 64 N. J. Eq. 770, the testimony of an agent was admitted when it was satisfactorily shown that it was made in the conduct of business entrusted to him.

Statements made by the general manager of a corporation at the office of the company of which he was apparently in charge, as a consequence of which proceedings in an action by the corporation were actually stayed, accompanied by the evidence of his subsequent acting with authority in the manner, are admissible in evidence against the corporation.³⁸

A statement made by the general agent of a corporation, in the course of his employment, of a fact within his official knowledge touching the status of a matter entrusted to him, is admissible in evidence on behalf of the party with whom the corporation was dealing at the time.³⁹

The declarations of a steamboat clerk, made after the delivery of goods, are not competent to charge the steamboat company with negligence in their transportation.⁴⁰

88. DE FACTO OFFICERS.

The directors of a corporation are selected by its stockholders. Whether they select eligible persons or not, or whether the persons selected are appointed in a legal way or not, is a matter of no concern to third persons. If the officers selected are ineligible, or are elected irregularly or illegally, but are allowed by the proprietors of the corporation to take control of its property, and to exercise its functions and powers, they become officers *de facto*, and as such may act for and bind the corporation. An officer *de facto* is one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law. From a very early time it has been held that the acts of *de facto* officers are binding upon the corporation until they are lawfully ousted, especially so far as their acts create rights in favor of third persons.¹

38—*Carey v. Wolff & Co.*, 72 N. J. L. 510 (Court of Errors & Appeals, 1906).

39—*Agricultural Ins. Co. v. Potts*, 55 N. J. L. 158 (Court of Errors & Appeals, 1892).

40—*Steamboat Company v. Flanagan*, 41 N. J. L. 115 (1879).

37—*Huebner v. Erie R. R. Co.*, 69 N. J. L. 327 (Court of Errors & Appeals, 1903).

1—*Mechanics National Bank of Newark v. Burnett Mfg. Co.*, 32 N. J.

In *Savage v. Ball*, 17 N. J. Eq. 142 (1864), the court said: "It is admitted that the directors, by whom the note was authorized to be made, were by color of election, directors de facto. The act of an officer de facto is good, wherever it concerns a third person who had a previous right to the act, or had paid a valuable consideration for it."

The corporation is estopped from denying the authority of one who is, de facto, a director, and in that capacity authorized to represent it.²

Thus where a director of a corporation made an assignment for the benefit of creditors, after which the remaining two directors executed chattel mortgages to certain persons who loaned money to the corporation at the same time, and who took the mortgages without notice that the director had ceased to be a stockholder, it was held, that as to third parties, dealing in good faith with the company, without notice of any infirmity in the title of such director, he must be regarded as a director de facto, and that thus the company had, when the security was given, three directors as required by law.³

The court of chancery will not, in an action by a corporation against its debtor, look into the regularity or validity of the election of the corporate officers. That question cannot be thus tried collaterally.⁴

89. NOTICE TO OR KNOWLEDGE OF OFFICER OR AGENT AS AFFECTING CORPORATION.

The doctrine of the cases imputing to the directors actual knowledge of a fact which, in the reasonable performance of their duty, they ought to have known, and establishing the rights of third persons against the company, the principal, upon the same basis as if actually known and assented to, is in harmony with the rules applied in other cases, both at law and in equity, as to the means of knowledge being equivalent to actual knowledge. The general rule as to charging notice or knowledge of a fact is "that whatever puts a party upon inquiry amounts, in judgment of law, to notice, provided it becomes a duty, as in the case of purchasers and creditors, and would lead to the knowledge of the requisite fact by the exercise of ordinary diligence and understanding."¹ "In cases like the present the rule should be applied strictly, rather than relaxed; and, in my judgment, the directors of the manufacturing company must, on the facts of this case, be charged with knowledge that David Blake, as their treasurer, was endorsing the paper received by the company from the sewing machine company for credit to its current account, and with the tacit or implied consent to these endorsements."²

Eq. 236 (1880); *Hackensack Water Co. v. DeKay*, 36 N. J. Eq. 548 (Court of Errors & Appeals, 1883).

2—*Kuser v. Wright*, 52 N. J. Eq. 825 (Court of Errors & Appeals, 1894).

3—*Kuser v. Wright*, 52 N. J. Eq. 825 (Court of Errors & Appeals, 1894).

4—*Hoboken Building Association v. Martin*, 13 N. J. Eq. 427 (1861).

1—4 Kent Com. Sec. 179; *Hoy v. Bramhall*, 19 N. J. Eq. 563, 572 (Court of Errors & Appeals, 1868).

2—*Blake v. Domestic Manufacturing Co.*, 64 N. J. Eq. 480 (1897).

Notice to directors when assembled as a board, would undoubtedly be notice to the corporation. Under what conditions knowledge acquired by a director in other than his official capacity, will be constructive notice to the corporation, and be binding on it, is not entirely settled in the cases. "A distinction has been taken between knowledge of illegality or want of consideration of a note, by a director who acts with the board in discounting it, and such knowledge on the part of a director who is not present and acting with the board when the discount is made. In the former case, it has been held that the bank is bound by his knowledge; in the latter it is not. This distinction has been criticized and condemned by Justice Story as sapping 'the foundations on which the security of all banking and other moneyed corporations has been supposed to rest, to wit, that no act or representation or knowledge of any agent thereof, unless officially done, made or acquired, is to be deemed the act, representation or knowledge of the corporation itself.' (Story on Agency, § 140b.) It will not be necessary to consider the soundness of this distinction, for it is admitted that Perrine's knowledge of the infirmity in the consideration of this note was acquired when he was acting in his private capacity; and the opening of counsel did not propose to show that he was present at the bank when the note was discounted and participated as a director in the act of discount." It was held, therefore, that a bank discounting a note before its maturity is not chargeable with the knowledge of illegality or want of consideration acquired by one of its directors in other than his official capacity such director not having acted with the board in making the discount. It was further held that a director offering a note of which he is owner to the bank of which he is a director, for discount, is regarded in the transaction as a stranger, and the bank is not chargeable with the knowledge of such director of an infirmity or defect in the consideration of the note.³

The question how far the knowledge of an officer of a corporation, which he acquired outside of the business of the company, and which was not, in fact, communicated to the corporation, is binding upon it, when it relates to dealings between the officer and the corporation, was considered by the Chancellor, in *Barnes v. Trenton Gas Light Company*, 27 N. J. Eq. 33 (1876). The bill was filed to set aside a conveyance made by executors in fraud of the powers contained in the will. The conveyance was made to Mr. Potts, who was the legal adviser of the executors, and also president of the gas light company. Potts conveyed directly to the company and the bill charged notice on the defendants solely on the ground that at the time of the conveyance to the company Mr. Potts was its president. On demurrer it was held that information which came to Mr. Potts' knowledge as counsel of

³—First National Bank of Hightstown v Christopher, 40 N. J. L. 435 (1878).

the executors, was not constructively notice to the corporation, and that the company was a bona fide purchaser without notice.⁴

In *Barnes v. Trenton Gas Light Co.*, the chancellor said:

"The general proposition is undoubtedly true, that notice of facts to an agent is constructive notice thereof to the principal himself, where it arises from, or is at the time connected with the subject matter of his agency. The rule is based on the presumption that the agent has communicated such facts to the principal. On principles of public policy the knowledge of the agent is imputed to the principal. But the rule does not apply to a transaction such as that under consideration; for, in such a transaction, the officer, in making the sale and conveyance, stands as a stranger to the company. His interest is opposed to theirs, and the presumption is, not that he will communicate his knowledge of any secret infirmity of the title to the corporation, but that he will conceal it. Where an officer of a corporation is thus dealing with them in his own interest opposed to theirs, he must be held not to represent them in the transaction, so as to charge them with the knowledge he may possess, but which he has not communicated to them, and which they do not otherwise possess, of facts derogatory to the title he conveys."⁵

And in *Graham v. Orange County Nat. Bank*, 59 N. J. L. 225, (Court of Errors and Appeals, 1896), it was held that if an officer of a bank, who is also a member of its discount committee, takes part in discounting a note made to him individually for an unlawful purpose in which he participated, his knowledge of such illegality is not imputable to the bank.

And if the agent, in the course of the business in which he is employed, commits an independent fraud, for his own benefit, designedly against his principal, and it is essential to the carrying out of the fraud that he should conceal the real facts from his principal, the presumption of constructive notice is destroyed. Thus, where the president and cashier of a trust company embarked in a partnership undertaking with an executor, who executed a mortgage to the trust company on property of the estate, the proceeds being used in the partnership venture, and not for the benefit of the estate, the knowledge of the president and cashier of the trust company of the fraudulent misapplication of the sum realized by the mortgage was not imputable to the trust company, and the mortgage was enforceable in its hand.⁶

Where the same person is an officer of two corporations, and he transfers securities issued by one to the other, with knowledge that the securities are subject to an infirmity which renders them invalid

4—Cited with approval in *First National Bank of Hightstown v. Christopher*, 40 N. J. L. 435 (1878).

5—*Barnes v. Trenton Gas Light Co.*, 27 N. J. Eq. 33 (1876). See also *Hartdorn v. Webb Mfg. Co.*, 75 Atl. 893 (Court of Errors & Appeals, 1910).

6—*Camden Safe Deposit & Trust Co. v. Lord*, 67 N. J. Eq. 489 (1904).

in any hands but those of a bona fide holder for value, his knowledge is not the knowledge of the transferee.⁷

In *Tate v. Security Trust Co.*, 63 N. J. Eq. 559 (1902), it was held that where the president of a trust company, acting as attorney for other parties, negotiated the execution of a mortgage to his clients, which was subsequently assigned to the trust company, it not appearing who conducted the transaction on its behalf, that the trust company was not chargeable with any knowledge its president may have had in regard to the purpose for which the mortgage was given.

In *Kelsey v. New England St. Ry. Co.*, 62 N. J. Eq. 742 (Court of Errors and Appeals 1900), the court said:

"The committee was only a special agent of the corporation, and therefore Kelsey, in bargaining with it, was chargeable with notice of its powers. *Milne v. Kleb*, 44 N. J. Eq. 378; *Dowden v. Cryder*, 55 N. J. Law, 329. Moreover, the agreement itself recited that the committee was acting 'by the written consent of the directors,' and this made it his duty to learn what that written consent, viz., the resolution, disclosed. We must therefore assume the knowledge of Kelsey that the members of the committee were not authorized by their principals to introduce into their negotiations or bargain any consideration advantageous to themselves exclusively."

The knowledge of an agent which is imputed to the company must, however, be that of an agent authorized to bind the company in regard to the transaction in which it is sought to bind the company.⁸

Thus in *Canda Manufacturing Co. v. Woodbridge*, 58 N. J. L. 134 (1895), it was held that neither the conduct of the superintendent of a corporation nor his information casually obtained (as school trustee) can estop the corporation, if his conduct had no relation to his position as superintendent and his information no pertinency to any matter in which the corporation had empowered him to act.

In *Willard v. Denise*, 50 N. J. Eq. 482 (Court of Errors and Appeals, 1892), the court laid down the rule that where information is casually obtained by an agent of a corporation, the corporation is not charged with notice from the mere fact of its agent's knowledge, but if the corporation act through such agent in a matter where the information possessed by him is pertinent, the knowledge of the agent will be imputed to the principal. But in a later case the same court said:

"The scope and to some extent the theory of the presumption of imputed knowledge has been the subject of two decisions in this court which are not in accord. I refer to *State v. Sooy*, 41 N. J. Law, 394 (1879), and *Willard v. Denise*, 50 N. J. Eq. 482. The latter of these cases, which was also the later in point of time, laid down the rule that 'Where information is casually obtained by an agent of a corporation, the corporation is not charged with notice from the mere fact of its agent's knowledge; but if the corporation act through

7—*DeKay v. Hackensack Water Co.*, 38 N. J. Eq. 158 (1884).

8—*Martin v. Jersey City Insurance Co.*, 44 N. J. L. 273 (1882).

such agent in a matter where the information possessed by him is pertinent, the knowledge of the agent will be imputed to the principal.'

"Under the rule thus stated, the defendant corporation is clearly chargeable with notice of all the pertinent information possessed by Assmann and used by him in its behalf. We are not, however, willing to rest our decision of this matter upon the case of *Willard v. Denise*. In the earlier case of *State v. Sooy*, the rule stated in the syllabus of the opinion, delivered by Mr. Justice Dixon is this:

"The knowledge of the agent is chargeable upon his principal whenever the principal, if acting for himself, would have received notice of the matters known to the agent.'"⁹

And in *Boice v. Conover*, 71 N. J. Eq. 269 (Court of Errors and Appeals, 1906), the court said that the rule adopted in *State v. Sooy* is the settled rule of this state.

"The knowledge of Shackelford cannot be imputed to the company because he was never authorized to act as its agent in any matter to which that knowledge was pertinent. His testimony is explicit and uncontradicted that in signing the lease and collecting the rent he acted solely on behalf of Young, and had no authority whatever from the company. Although he was secretary of the company during the running of the lease and became a director in November, 1903, yet in neither capacity did any duty rest upon him concerning the complainants' tenancy. Whether the view stated in *Sooy v. State*, 41 N. J. Law, 394, or that stated in *Willard v. Denise*, 50 N. J. Eq. 482, be adopted, knowledge possessed by one person cannot be ascribed to another unless there exists between them a relation of agency, in the exercise of which the knowledge would be useful."¹⁰

90. INDIVIDUAL INTEREST OF OFFICER OR AGENT AS AFFECTING PERSON DEALING WITH CORPORATION.

The rule is settled in this state, that where an officer deals with a corporation in a matter in which his interest is opposed to that of the corporation, he does not, in such transaction, represent the corporation so as to impute his knowledge to his principal.¹

"It is a settled rule of commercial law that one who receives from an officer of a corporation the note of such corporation in payment of or as security for a personal debt of such officer, does so at his peril. *Prima facie*, the act is unlawful, and unless actually authorized or ratified by the corporation, such note is void in the hands of the payee."²

9—*Vulcan Detinning Co. v. American Can Co.*, 72 N. J. Eq. 387 (Court of Errors & Appeals, 1906).

10—*Clement v. Young-McShea Amusement Co.*, 70 N. J. Eq. 677 (Court of Errors & Appeals, 1905).

1—*Camden Safe Deposit & Trust Co. v. Lord*, 67 N. J. Eq. 489 (1904); *DeKay v. Hackensack Co.*, 38 N. J. Eq. 153 (1884); *Barnes v. Trenton Gaslight Co.*, 27 N. J. Eq. 33 (1876). See also section 89 above.

2—*DeJonge & Co. v. Woodport Hotel & Land Co.*, 77 N. J. L. 233 (1909);

Where a corporate officer took checks payable to the order of his company, endorsed them in blank, and requested the company's bank to give him the cash therefor, which was done, it was held upon the facts disclosed, which showed authority in the agent to endorse for collection and deposit, that such act was without authority and the bank was held liable. This case indicates the necessity for caution on the part of a bank in dealing with corporate officers. The court said: "The bank had need to be but little concerned in the practice of making deposits, because in that case it was to collect the money and would have it to answer the exigencies of any irregularity, but it was very seriously interested in the authority for any practice which called for the payment out of money, because if there should be lack of authority in the drawer, loss might fall upon it beyond repair." It had been the practice of the company to withdraw money only upon the check of the treasurer, countersigned by another officer. "The demand offered an entirely new course of business, conspicuously at variance with, and utterly destructive of the safeguard of the doubly signed check, and ignorant or regardless of the treasurer's prerogatives which had theretofore been most carefully maintained."³

A contract is not enforceable against the corporation when the party dealing with the directors has given to any of them a secret interest in the contract.⁴

In *Kelsey v. New England St. Ry. Co.*, 62 N. J. Eq. 742 (1901), the Court of Errors and Appeals held that where a contract made by the committee of the directors to secure for themselves an exclusive personal benefit which had never been assented to by the board of directors or by the stockholders, the court of chancery would not decree specific performance against the objection of the corporation and its stockholders.

A contract awarded to a private corporation by commissioners of a municipal corporation, one of whom is a stockholder of the company, is invalid and will be set aside at the suit of a taxpayer.⁵

91. ACTIONS AND SUITS BY AND AGAINST CORPORATION.

The Corporation Act provides (§ 1, subd. II) that every corporation shall have power "to sue and be sued in any court of law or equity."

"The words 'to sue and be sued,' give to this artificial person, no greater powers, and subjects it to no greater responsibilities, than as if they were natural persons charged with the same duties. A cor-

Campbell v. Manufacturers' National Bank, 67 N. J. L. 301 (Court of Errors & Appeals, 1902).

3—*American Saw Co. v. First Nat. Bank*, 60 N. J. L. 417 (Court of Errors & Appeals, 1897).

4—*Kelsey v. New England St. Ry. Co.*, 62 N. J. Eq. 742 (Court of Errors & Appeals, 1901).

5—*Brown v. Street Lighting District*, 71 N. J. L. 79 (1904) affirmed 62 Atl. 267 (Court of Errors & Appeals, 1905).

porate body is merely a legal or artificial person substituted for a natural person. These words of the statute are of no manner of importance; and although it is usual in the charters granted by this state to corporations to insert this clause; yet it might be rejected as surplusage, without interfering in the slightest degree with their corporate powers. The simple act of incorporation, gave to the Board of Chosen Freeholders, as a necessary incident, the right to sue and be sued. It is one of the essential and ordinary incidents to every corporation." ¹

A corporation is a necessary party to a suit in equity, brought in the name of the president, to enforce a contract signed by him as president and on behalf of the corporation.²

"An action merely transitory shall, at the discretion of the Court, be tried in the county in which the cause of action arose, or the plaintiff or defendant resides at the time of instituting such action, or, if the defendant be a non-resident in the county in which process was served upon him." ³

Where the cause of action arose without the state, and the plaintiff is a non-resident corporation and the defendant is a domestic corporation, the venue should be laid in the county in which the principal office of the domestic corporation is located, and if laid in another county will be changed.⁴

Section 5 of Article 2 of the Chancery Act (P. L. 1902, p. 511) providing for the method of service of process for appearance upon the defendant, does not mention corporations by name, but inasmuch as the name "person" in a statute includes corporations if they fall within the general reason and design of the act, this section of the Chancery Act must be interpreted as warranting such service of process upon a corporation defendant as is equivalent to personal service upon an individual, and such service may be made on any officer or agent whose duty it is in his official capacity or by virtue of his employment to communicate the fact of such service to the governing body of the corporation.⁵

Thus it was held that service of a subpoena ad respondendum on a domestic corporation, defendant in a foreclosure suit, by delivering the same at the registered office of the company in this state to the vice president, also a director, was due service upon the corporation.⁶

In any personal action commenced against a corporation in any of the courts of law of this state, the first process to be made use of may

1—Freeholders of Sussex v. Strader, 18 N. J. L. 108, 117 (1840).

2—Nichols v. Williams, 22 N. J. Eq. 63 (1871).

3—Practice Act; P. L. 1903, p. 537, c. 247, § 202.

4—D. L. & W. R. R. Co. v. N. J. Ice Co., 65 N. J. L. 524 (1900). See also Thorn v. Central R. R. Co., 26 N. J. L. 121 (1856).

5—Martin v. Atlas Estate Co., 72 N. J. Eq. 416 (Court of Errors & Appeals, 1906).

6—Martin v. Atlas Estate Co., 72 N. J. Eq. 416 (Court of Errors & Appeals, 1906).

be a summons, a copy whereof shall be served on the president, or other head officer or agent in charge of its principal office in this state, or left at his dwelling house or usual place of abode, at least six days before its return; and in case the president or other head officer or agent cannot be found to be served with process, and has no dwelling house, or usual place of abode within this state, a copy of the summons shall be served on the clerk or secretary of the corporation, if any there be, and if no clerk or secretary, then on one of its directors, or left at his dwelling house, or usual place of abode, six days before its return.⁷

When the sheriff or other officer shall return such summons "served" or "summoned," the defendant shall be considered as appearing in court, and may be proceeded against accordingly.⁸

In case the sheriff or other officer shall return a summons, issued against any corporation of this state, "not served" or "not summoned," and an affidavit shall be made to the satisfaction of the court that process cannot be served upon it, the court shall make an order directing the defendant to cause its appearance to be entered to the action, on a day to be specified in the order, a copy of which order shall be inserted in one of the newspapers published in this state, for at least three weeks, once in each week, and a copy thereof shall also be posted in three public places in this state, as shall be ordered by the court, for at least three weeks, and if the defendant shall not appear within the time limited by the order, or within such further time as the court shall limit, then, on proof of the publication and posting of the order, the court shall order the clerk to enter appearance for the defendant, and thereupon the action shall proceed as if the defendant had entered its appearance to the action.⁹

No corporation against which an order for publication shall be made, as aforesaid, shall grant, bargain, sell, alter or convey any lands, tenements or real estate in this state (in case the said summons issued out of the supreme court), or in the county in which the said summons shall have been issued (in case the said summons issued out of the circuit court or the court of common pleas), of which it shall be seized or entitled to at the time of making such order, until the plaintiff in the action shall be satisfied his legal demand, or until judgment shall be entered for the defendants; and the said action shall be and remain a lien on such lands, tenements and real estate, from the time of entering the said order for publication in the minutes of the court, and the said lands, tenements and real estate shall and may be sold on execution, as if no conveyance had been made by the said corporation.¹⁰

Section 87 of the Corporation act does not, either expressly or by implication, prohibit a corporation from submitting itself to the juris-

7—Corporation Act, § 87.

8—Corporation Act, § 89.

9—Corporation Act, § 90.

10—Corporation Act, § 91.

diction of the court in which it is sued by voluntarily appearing to the suit or by acknowledging the service of process. The common law practice in that respect remains unaltered by the statute.¹¹

Acknowledgment of service of summons by the attorney of a corporate defendant submits the person of the corporation to the jurisdiction of the court.¹²

Service of process on the statutory registered agent is not required to be made at the registered office.¹³

In courts for the trial of small causes, service may be had as follows:

If the defendant is a domestic corporation, the summons may be served on the president or head officer or agent in charge of its principal office in this state, either personally or by leaving a copy at his usual place of abode, at least six days before its return; and in case the president or other head officer or agent cannot be found to be served with process, and has no usual place of abode in the county, the summons may be served on the clerk or secretary of the corporation, if any there be within the county, and if no clerk or secretary, then on one of its directors, and if no director, then upon the agent in charge of any office maintained in the county, either personally or by leaving a copy at his usual place of abode within the county, six days before its return. If the defendant is a foreign corporation, process may be served upon the agent in charge of its principal office in this state, or upon any officer, either personally or by leaving a copy at his usual place of abode, or by leaving a copy at the office, depot or usual place of business of such foreign corporation within the county, with any person in charge thereof.¹⁴

Section 95 of the Practice Act provides that "when the defendant is in court the plaintiff may at any time within thirty days after the return day of the process, file his declaration and serve a copy thereof on the defendant; in either case the defendant shall file his plea or demurrer within twenty days after such service of the declaration, or on failure thereof judgment may be entered against him." In the case of a corporation which has appeared by attorney, service on the attorney is a sufficient service. If the corporation has not appeared by attorney, the practice as settled by the Supreme Court in the case of *Dock v. Elizabethtown Steam Manufacturing Co.*, 34 N. J. L. 312, 318, is as follows:

"That where defendant is a corporation created for and engaged in trade or business, a service on any officer or agent of the company, whose duty it is, either in his official capacity or by virtue of his employment, to communicate the fact of such service to the governing body of the corporation, is good.

"That whether the person upon whom the service is made is such

11—*Beebe v. The George H. Beebe Company*, 64 N. J. L. 497 (1900).

12—*Beebe v. The George H. Beebe Company*, 64 N. J. L. 497 (1900).

13—*P. & C. Ferry Co. v. Intercity R. R. Co.*, 73 N. J. L. 86 (1905); affirmed 74 N. J. L. 594 (Court of Errors & Appeals, 1907).

14—P. L. 1906, p. 48.

that a service upon him is good, depends upon the circumstances of each particular case, having regard to the purposes for which the corporation was created, and the nature of the duties of such person, either in his official capacity or by the usages of the company."

And in that case the court held that service on a bookkeeper at the office of the company was not a sufficient service, it not appearing that knowledge of such service was communicated to the proper officers of the company.

"In *Dock v. Elizabeth Manufacturing Co.*, 34 N. J. L. 312, Mr. Justice Depue, in an opinion in the Supreme Court construed the thirty-fifth section of the Practice act of 1855 in its relation to the service of a copy of the declaration upon a private corporation. That section provided that if the plaintiff after the defendant is in court, filed his declaration sooner than required by law, and served a copy on the defendant, the plea or demurrer should be filed in thirty days after such service or judgment might be entered against him. Section 106 of the present Practice act (Gen. Stat., p. 2551) had not then been passed; it became part of the Practice act of 1872. Before 1872, under the common law rule, personal service was necessary. The service in the case of *Dock v. Elizabeth Manufacturing Co.*, was made upon the bookkeeper of the defendant corporation. Mr. Justice Depue held that as the law was silent as to the mode of service, the service might be made personally upon a natural person or upon a private corporation, or upon the agent of either, where his duty is to communicate the fact of service to his principal. The service was deemed to be insufficient in that case because the person upon whom service was made was not such an agent. After the decision in that case, which was in 1870, the act of 1872 was passed, now section 106 of the Practice act authorizing service to be made personally or by leaving the copy at the dwelling house of an individual defendant, or personally upon the President in the case of a corporation, or by leaving it at his dwelling house. This gave a manner of service in addition to that required at common law."¹⁵

The Practice Act now provides (§ 96) that the copy of the declaration, when served separately from the process, may be served on a corporation in the same manner as a summons.¹⁶

Under the supplement to the Practice act, approved May 3rd, 1899, an affidavit of merits was required when the declaration with the proper notice endorsed is served on the defendant personally, at the time of serving the summons, as well as when the same is so served after the defendant is in court. The affidavit of merits must, in all such cases, be filed within ten days after the service of the declaration and notice. Under the supplement above mentioned, it was held that service of the declaration and notice upon the secretary of a corporate defendant is not service upon the defendant personally. "Whether such a service

¹⁵—*Cooper v. Cape May Point*, 67 N. J. L. 437 (1902).

¹⁶—P. L. 1903, p. 537, § 96.

can be made upon a corporation need not now be decided. If it be possible, it must be by service upon the stockholders or the directors or trustees, when convened as a body, for only such a body can, in any fair sense, be said to constitute the corporate personality. Other persons are but agents of the corporation."¹⁷

But the Practice act now provides (§ 97, as amended by P. L. 1906, p. 677) that in the case of a domestic corporation defendant the declaration may be served personally upon the president or other head officer or agent in charge of its principal office in this state.

The word "process" as used in the attachment act, is very broad and it cannot be considered as only synonymous with the word "summons." A summons is, of course, a process, but many kinds of process are not a summons, and the word in the Attachment act means any kind of legal writ to which a corporation under our laws may at any time and in any way be subject, and among these is the liability to become a garnishee by the proper service of attachment in a suit between other parties, although it is neither the plaintiff nor defendant in the original suit.¹⁸

Proceedings by way of contempt will lie against corporations as well as against individuals. In the case of individuals the process is by attachment, followed by a fine or imprisonment or both. In the case of a corporation, the process in equity courts is by writ of sequestration. In courts of law *distringas* is the appropriate writ against a corporation.¹⁹

An averment of the corporate existence of the complainant in a bill filed by a corporation, is unnecessary.²⁰

In suits in Chancery, a corporation must answer under its seal. The practice is in accordance with the ancient though somewhat obsolete rule of the common law, that a corporation, being an invisible body, acts and speaks only by its common seal. The fact that the corporation has no common seal affords no grounds for relaxing the practice. It is an inseparable incident of every corporation that it may have a common seal, and make, alter and renew the same at pleasure. It may use and adopt any seal *pro hac vice*. It may be a bit of paper attached by wafer, without any impression indicative of a common seal of a corporation. If any seal whatever is attached to the answer by the authority of the corporation, it becomes its seal, and if the answer is verified in usual form by the signature of an officer of the corporation, his affidavit that the seal so affixed is the seal of the corporation, and was affixed by authority of the corporation, the answer upon its face purports to be and is under the corporate seal.²¹

17—*Laufman & Co. v. Hope Manuf. Co.*, 54 N. J. L. 70 (1891).

18—*Franklyn v. Taylor Hydraulic, etc., Co.*, 68 N. J. L. 113 (1902).

19—*West Jersey Traction Co. v. Camden*, 58 N. J. L. 536 (1896).

20—*German Reformed Church v. Von Puechelstein*, 27 N. J. Eq. 30 (1876).

21—*Ransom v. Stonington Savings Bank*, 13 N. J. Eq. 212 (1860).

When a change occurs in the officers of a corporation between the time it is brought into court and the time when its answer is filed, the answer must be filed by the persons who are officers at the time of the filing.²²

Exceptions for insufficiency will lie to the answer of a corporation.²³

It is not necessary in a declaration to aver that the plaintiffs are a corporation. "In the present case, the name of the plaintiffs is distinctly stated, and the law will presume it to be truly stated, till the contrary appear, and cannot without a tax upon common sense, infer it to be the name of an individual or natural person; nor will it presume it to be the name of an unincorporated company or partnership, who can sue only in their individual names; but of an incorporated company who have the right to sue in their incorporated name."²⁴

A plaintiff cannot, in one action, assert an independent liability of a corporation in one count, an independent liability of the individual directors of the corporation in another count, and the liability of both the corporation and the individual directors in a third count.²⁵

An affidavit to a plea or demurrer put in by a corporation is insufficient if made by an attorney or agent in the suit, unless it shows that the officers of the company are absent.²⁶

In a suit where a corporation is a party, the officers and members are not parties to the action, and are competent witnesses, both at common law and under the statute.²⁷

"It is true that a corporation is an artificial being, invisible and intangible, but it is a collection of individuals united in one body, acting and speaking through its officers and agents. Since the law which enacts that interest in the event shall not disqualify a witness, the officers and agents as well as stockholders, are admitted to testify. So long as they are admitted as witnesses, the corporation cannot be said to be under legal disability."²⁸

Where a corporation is a party to the record, neither the president, secretary, the individual directors nor stockholders are parties to the action, and they cannot be examined after issue joined and before the trial of said action, under section 159 of the Practice Act.²⁹

The testimony of officers or directors of a corporation called as witnesses in its behalf, in an action in which it is a party, is not testimony given by the corporation, and, consequently, is not rendered incompetent by the proviso of the supplement to the "Act Concerning

22—*Mechanics' National Bank of Newark v. Burnett Mfg. Co.*, 32 N. J. Eq. 236 (1880).

23—*Reed v. Cumberland Insurance Co.*, 36 N. J. Eq. 393 (1883); *Flitcroft v. Allenhurst Club*, 69 N. J. Eq. 13 (1905).

24—*Bennington Iron Co. v. Rutherford*, 13 N. J. L. 105 (1840).

25—*Marter v. Henry Sanchez Co.*, 77 N. J. L. 95 (1903).

26—*McTague v. P. & N. E. R. R. Co.*, 44 N. J. L. 62 (1882).

27—*Assurance Association ads. Cole*, 26 N. J. L. 362 (1857).

28—*North Hudson County Ry. Co. v. May*, 48 N. J. L. 401 (1886).

29—*Apperson v. Mutual Benefit Life Ins. Co.*, 38 N. J. L. 272 (1876).

Evidence," approved February 25, 1880, which declares that a party to an action in cases where his adversary sues or is sued in a representative capacity, shall not be permitted to give testimony as to any transaction with or statement by any testator or intestate represented in said action.³⁰

In *Morris Canal & Banking Co. admr. Vannatta*, 17 N. J. L. 159 (1839), it was held, that on removing a cause into the Supreme Court by habeas corpus, bail must be put in even by a corporation according to the statute, if required by the plaintiff. The Court said: "It is true, a corporation cannot be arrested, nor can it be surrendered by bail, but the recognizance required by the statute, is an absolute undertaking, and cannot be discharged by surrendering the defendant.

In *Conner v. Todd*, 48 N. J. L. 61 (Court of Errors and Appeals, 1866), the court held that the property of a corporation which is a judgment debtor cannot be reached under supplementary proceedings taken under the "act respecting executions." The court said:

"The act respecting executions provides for the appointment of a receiver of the debtor's property, who is to apply it to the payment of the judgment creditor's debt, and the cost of the proceedings and his own compensation, and then to pay the balance, if any, into court. It gives a preference to the judgment creditor who invokes its aid. The act concerning corporations, on the other hand, provides for the payment of the creditors of an insolvent corporation out of its assets, proportionally, according to the amount of their debts, except mortgage and judgment creditors, when the judgment has not been confessed to give preference. It provides against preferences. Both acts sequester the property of the debtor, the one for the benefit of the judgment creditor who takes the proceedings, the other for the benefit of all the creditors. Nor can it be successfully urged that a corporation may be subject to the provisions of the act respecting executions and not be within the provisions of the act concerning corporations in reference to insolvent companies; that is, that its property may be so situated that it cannot be reached by execution, and yet the corporation may not be insolvent. A corporation which is a judgment debtor, whose property cannot be reached by execution would be decreed to be insolvent. The proceedings under which the receiver in this case was appointed were void for want of jurisdiction, and consequently no title passed by the receiver's sale."

The legislature, however, soon after amended the statute so as to expressly bring within its operation the case of a corporation defendant (P. L. 1893, p. 450; P. L. 1907, p. 363).

The Corporation Act provides (§ 61) that every agent or person having charge or control of any property of a corporation, on request of any public officer, having for service a writ of execution against it,

30—*New Jersey Trust Co. v. Camden Safe Deposit Co.*, 58 N. J. L. 196 (Court of Errors & Appeals, 1895).

shall furnish to him the name of the directors and officers thereof, and a schedule of all its property, including debts due or to become due to it, so far as he may have knowledge of the same.

The Corporation Act provides (§ 62) that if any officer holding an execution, shall be unable to find other property belonging to the corporation liable to execution, he or the judgment creditor may elect to satisfy such execution, in whole or in part by any debts due to the corporation; and it shall be the duty of any agent or person having custody of any evidence of such debt, to deliver the same to the officer, for the use of the creditor, and such delivery, with a transfer to the officer in writing, for the use of the creditor, and notice to the debtor, shall be a valid assignment thereof; and such creditor may sue for and collect the same in the name of the corporation, subject to such equitable set-offs on the part of the debtor as in other assignments; and every agent or person who shall neglect or refuse to comply with the provisions of this and the last preceding section, shall be himself liable to pay to the execution creditor the amount due on said execution, with costs.

Special franchises owned by a corporation cannot be sold under a common law execution issued upon a judgment at law against the corporation.³¹

Corporations are not liable to be proceeded against under the eighty-eighth and subsequent sections of the Chancery Act, which provide, by way of creditor's bill, a mode of reaching choses in action. "The clear policy of our Corporation Act is that the assets of an insolvent corporation should be equally divided among its creditors. Its assets are to be administered in that regard like those of a decedent."³²

The statutory test provided by the Attachment Act of 1901 for an attachment against a corporation is not whether it be a resident or non-resident, but whether it be a corporation created or recognized as a corporation of this state by the laws of this state. Section 1 of the Attachment Act of 1901 does not warrant the issue of an attachment against a corporation. That section originated in the Attachment Act of 1798, and in *Goldmark v. Magnolia Metal Co.*, 65 N. J. L. 341, Chief Justice Depue said "That statute provided only for writs of attachment against absconding debtors or debtors residing out of the state. The act provided a complete method of procedure, substantially the same as the statute now in force. It did not authorize a writ of attachment against a corporation." The sole authority for an attachment against a corporation under the Act of 1901 is to be found in section 4 which limits and defines a class of corporations against which a writ may be issued, being, "corporations not created or recognized as corporations of this state by the laws of this state."³³

31—*State v. Middletown Turnpike Co.*, 65 N. J. L. 73 (1900).

32—*Mallory v. Kirkpatrick*, 54 N. J. Eq. 50 (1895).

33—*Brand v. Auto Service Co.*, 75 N. J. L. 230 (1907).

92. NATURE, GROUNDS AND EXTENT OF CORPORATE LIABILITY FOR TORTS AND CRIMES.

In the earlier cases it was held that an action of trespass could not be maintained against a corporation aggregate, for the technical reason that a *capias* and *exigent*, the proper process in actions of trespass, would not lie against a corporation; but this technical objection was not uniformly yielded to, as instances of actions of trespass against corporations are to be met with as early as the year books. As corporations became more numerous and were multiplied, until aggregated capital, seeking investment for the purposes of business, is generally invested under acts of incorporation to protect individuals from personal liability, technical objections which stood in the way of subjecting corporations to actions founded on torts have been entirely swept away, and corporations have been held liable for all torts, the same as individuals. "And generally it may be stated that a corporation is liable civiliter the same as a natural person, for the tortious acts of its servants or agents, in the course of their employment, committed by the authority of the corporation, express or implied, whether such acts fall within the designation of forcible, negligent, malicious, or fraudulent torts, and without regard to the form of action by which the appropriate remedy is sought. And upon the trial, the question whether the corporation is liable for the acts of its servants or agents, will depend upon the same principles which govern the liability of a master for the acts of his servants."¹

"The better and the modern opinion is, that a corporation may be held liable even for its torts, in a special action upon case, for a neglect of duties, in particular cases, and even in trespass for the authorized torts committed by its agents, but all these powers and liabilities are attached to corporations by the policy of the law, which seeks, as far as possible, to make them answerable to the same extent as individuals."²

A corporation cannot defend itself, in an action for a tort done by it on the ground that the business in the prosecution of which the tort was done was *ultra vires*. The Court said: "But the doctrine of *ultra vires* does not apply to torts of this nature. It would indeed be an anomalous result in legal science if a corporation should be permitted to set up that inasmuch as a branch of the business prosecuted by it was wrongful, therefore all the special wrongs done to individuals in the course of it were remediless. But in such situations corporate bodies, like individuals, cannot take advantage of their own wrong by way of defence. If corporations are not to be held responsible for injuries to persons done in the transaction of a series of wrongful acts, such an immunity would have a wide scope. All wrongs done by such

1—*Brokaw v. N. J. R. & Transportation Co. and Campbell*, 32 N. J. L. 328 (1867).

2—*Freeholders of Sussex v. Strader*, 18 N. J. L. 108 (1840).

bodies are, in a sense, *ultra vires*, and if the want of a franchise to do the tortious act be a defence, then corporations have a dispensation from liability for these acts peculiar to themselves.”³

In the above case the plaintiff was injured by the mismanagement of a street horse car. The defendant contended that even if the jury found that it ran such horse cars that, as it had no franchise so to do, it could not be liable to the action. It was held that such defence was untenable.

“There was an early impression that inasmuch as malice was an element in every libel, and as it was thought that a corporation was an entity without mind, so no bad mind or malice could be attributed to a corporate body. This was the view taken by Baron Alderson in the case of *Stevens v. Midland County Railway Company*, 10 Exh., 352, a case decided as late as the year 1854. It was an action for malicious prosecution. The same view was taken by some of the courts in this country * * *. The expressions in the opinions in these cases exhibit the strength of the sentiment against the possibility of holding a corporation responsible in any action in which malice was an element. I do not think that this view has the countenance of the correct application of legal rules or is now supported by the weight of authority * * *. I think there is no reason why there should exist any immunity for corporation for malicious torts. For all torts not malicious, it is held, by a uniform line of cases, I think, without a single exception, that a corporation is responsible. The reason assigned, in some cases, as I have already observed, for the exception of malicious torts from the general rule, is, that a corporation has no soul or mind. But it is obvious that mind, in its legal sense, means only the ability to will, to direct, to permit, or assent.”⁴

Chancellor Runyon said “Not only does common sense scout the proposition that while a natural person is liable for damages for libel, an artificial one, composed of several natural persons, is not, but has legal license and immunity to libel as and whom it will; but it is a familiar principle that a corporation is liable for the tortious acts of its servants.”⁵

A private corporation is also liable for defamatory words spoken by its officers or agents.⁶

An action of trespass for an assault and battery will lie against a corporation. If the trespass was committed by the agent of the company, wilfully, or of his own malice, under color of discharging the duties of his employment; or if he has departed beyond the line of his

3—*N. Y., L. E. & W. R. R. Co. v. Haring*, 47 N. J. L. 137 (Court of Errors & Appeals, 1885).

4—*Mr. Justice Reed in McDermott v. Evening Journal*, 43 N. J. L. 488 (1881); affirmed 44 N. J. L. 430 (Court of Errors & Appeals, 1882).

5—*Evening Journal Ass'n v. McDermott*, 44 N. J. L. 430 (Court of Errors & Appeals, 1882).

6—*Empire Cream Co. v. de Laval Dairy Co.*, 75 N. J. L. 207 (1906).

duty to commit a trespass, the company will not be liable. But if the act of the agent was authorized by the rules and regulations of the company, or was necessary to accomplish the purposes of his employment, the company is answerable, even for the unnecessary violence of the agent.⁷

An action for malicious prosecution may be maintained against a corporation aggregate.⁸

No action can be maintained for injuries resulting to individuals from acts done by persons in the execution of a public trust and for the public benefit, acting with due skill and caution and within the scope of their authority. But this principle does not apply to a private corporation authorized by the legislature to construct works of public improvement, by private capital for private emolument. It will not be presumed that the legislature, in conferring authority upon a corporation to construct a work of public improvement for private emolument, and for this purpose to take private property upon making compensation, designed to exempt the corporation from liability for injuries resulting from their acts. The common law liability for such injuries remains. The liability of the corporation for damages does not depend upon the question whether it is a public or private corporation, but whether the franchise is created for private emolument or exclusively for the public good.⁹

"There is an obvious distinction between the liability of a private corporation to public prosecution for a legalized nuisance, and its liability to a private action for damages arising from such nuisance. In one case, the legislative authority is a protection, and in the other it is not. Said the Court in *Tinsman v. Belvidere Delaware R. R. Co.*, 26 N. J. L. 148 (1857): 'The position that a corporation authorized to construct public highways, or other works of public improvement are vested with the immunities that pertain to the sovereign, and are exempt from liability to damages for injuries done to individuals in the exercise of that power, cannot be sustained upon grounds of reason and justice. That the individual is entitled, in justice and equity, to remuneration, has never been denied. It is a principle of natural, as well as constitutional law, that private property can be taken for public use by virtue of the eminent domain, only upon just compensation. And in regard to that class of injuries not falling within the pale of the constitutional provision, at least where the injury is direct, it is admitted that the party injured, upon principles of natural justice, is entitled to reparation.' The distinction is drawn, in that case, between the non-liability of public agents, in the construction within their limitations, of public works and the liability of private corporations authorized by the legis-

7—*Brokaw v. N. J. R. & Transportation Co.*, 32 N. J. L. 328 (1867).

8—*Vance v. Erie Railway Co.*, 32 N. J. L. 334 (1867).

9—*Tinsman v. Belvidere Delaware R. R. Co.*, 26 N. J. L. 148 (1857).

lature to construct and operate works for their own emolument, though for public advantage." ¹⁰

The distinction is between those incidental injuries which are unavoidable in the operation of a railroad in the transaction of its business, such as the sounding of whistles, the emission of smoke and sparks from locomotives, the noise and vibrations incident to the moving of trains, annoyances from the character or condition of freight transported, and the like, which are injuries partaking of the nature of public injuries, and acts which are a direct invasion of private property. Injuries of the class first mentioned are the necessary concomitants of the use of the franchises granted. The acts from which such injuries arise, being legalized by the company's charter, are not public nuisances, and there is no foundation on which to apply the principle that a private individual may maintain an action for an injury arising from a public nuisance which is special and peculiar to him beyond that suffered by the public. But for acts done under the legislative sanction, which are essentially private wrongs and a direct invasion of private property, the company's charter is no justification. ¹¹

Thus in *Mehrhof v. D. L. & W. R. R. Co.*, 51 N. J. L. 56 (1888), it was held that an action will lie against a private corporation maintaining a nuisance by one who has suffered special damage therefrom, as where owners of a brick yard were prevented by an obstruction in a river from operating their boats in transporting brick to market.

In an action of trespass for an assault and battery against a corporation, an individual may be joined, as a co-defendant, with the corporation. ¹²

A corporation itself, the legal entity, cannot commit either a willful or negligent act. It is not responsible for the act of any person nor its agent or servant, hence a declaration must contain words which impute liability to it through its actors—its officers, agents or servants. The declaration must, upon its face, show that an action has accrued against the corporation by the alleged act or default of those for whom it must respond under the well established principle of *respondet superior*. ¹³

In actions for torts by incorporated companies, the correct mode of pleading is, to show a case in the declaration to all appearance standing aloof from the statutory right of the company; but if a color of right to do the act in question is shown in the company, then the abuse of such right must be laid. ¹⁴

A corporation may be held liable for punitive damages. ¹⁵

11—*Costigan v. Pennsylvania R. R. Co.*, 54 N. J. L. 233 (1892).

10—*MacAndrews v. Collierd*, 42 N. J. L. 189 (Court of Errors & Appeals, 1880).

12—*Brokaw v. N. J. R. & Transportation Co.*, 32 N. J. L. 328 (1867).

13—*Tomlin v. Hildreth*, 65 N. J. L. 438 (1900).

14—*Stephens & Condit Transportation Co. v. Central R. R. Co.*, 33 N. J. L. 229 (1869).

15—*Hoboken Printing Co. v. Kahn*, 59 N. J. L. 218 (1896); *Peterson v.*

In *Carey v. Wolff & Co.*, 72 N. J. L. 510 (1906), the Court of Errors and Appeals said: "that unless the act of the executive head of the corporation was treated as the act of the corporation, the rule which holds a master liable to respond in punitive damages for the malicious and wanton act of his servant, when that act receives the approval of the master, has no application where the master is a corporation, for it can only act through officers selected to represent it. No case, he adds, can be found which holds such a doctrine. In the present case the unwarranted act of the constables was ratified both by the President and General Manager of the defendant * * *. If a corporation is ever to be held for punitive damages we think it should be so held in this case." The judgment of the lower court was affirmed with costs.

"In this state there is an express legislative recognition of the liability of corporations to indictment. The act of February 10th, 1837, provides a mode of compelling the appearance of corporations to indictments, and of enforcing sentence upon conviction. It is not understood that the counsel for the defence question or deny the liability of a corporation aggregate to indictment. The question discussed upon the argument was, not whether a corporation aggregate may be indicted, but for what offence it may be indicted, or what offence a corporation aggregate may in its corporate capacity commit. It is insisted, that although a corporation is liable to indictment for neglect of duty or mere nonfeasance, it cannot be indicted for any offence requiring for its commission a direct and positive act. * * * It being conceded that an indictment will lie against a corporation aggregate for a nonfeasance, or for any cause whatever, all preliminary and formal objections arising out of the invisibility and intangibility of the body aggregate, the impossibility of arresting it, its inability to appear, its incapacity for punishment, and the injustice of punishing innocent stockholders for the acts of others, are at once disposed of. These objections apply, it is obvious, with equal force to indictments for acts of nonfeasance. If they are invalid as to the one they are equally so as to the other.

"But it is said, that although a corporation may omit to perform acts made obligatory upon it by law, and thus be liable for nonfeasance, yet from its very nature it cannot use force, and therefore cannot commit any act involving force, and which must be charged to have been committed *vi et armis*. This argument rests entirely upon the disability of the corporation to commit any act of trespass or positive wrong, and applies to its capacity to commit civil as well as criminal injuries. It is the very argument by which it was sought to be established that no action for a trespass or tort would lie against a corporation. But it has been well said, that if a corporation has itself

Middlesex & Somerset Traction Co., 71 N. J. L. 296 (Court of Errors & Appeals, 1904); *Carey v. Wolff & Co.*, 72 N. J. L. 510 (Court of Errors & Appeals, 1906).

no hands with which to strike, it may employ the hands of others; and it is now perfectly well settled, contrary to the ancient authorities, that a corporation is liable civiliter for all torts committed by its servants or agents by authority of the corporation, express or implied. (Citing cases) * * * The earlier authorities, denying the liability of corporations civiliter for torts, are nearly all traceable to the dictum of Chief Justice Thorpe, in *Liber Ass.* 100, pl. 67, that "a writ of trespass lies not against a commonalty, for, he said, a man shall never have a *capias* or exigent against a commonalty." From this view of the law, it would seem that the difficulty in holding corporations liable civiliter for their tortious acts was originally supposed to consist not in the inability of the corporations to commit wrong, but in the incapacity of the courts to administer the remedy.

"The result of the modern cases is, that a corporation is liable civiliter for torts committed by its servants or agents precisely as a natural person; and that it is liable as a natural person for the acts of its agents done by its authority, express or implied, though there be neither a written appointment under seal, nor a vote of the corporation constituting the agency or authorizing the act. The doctrine is founded on sound principle, and applies, so far at least as the present objection is concerned, as well to the criminal as to the civil liability of the corporation."¹⁶

"It is true that there are crimes (perjury for example) of which a corporation cannot, in the nature of things, be guilty. There are other crimes, as treason and murder, for which the punishment imposed by law cannot be inflicted upon a corporation. Nor can they be liable for any crime of which a corrupt intent or *malus animus* is an essential ingredient. But the creation of a mere nuisance involves no such element. It is totally immaterial whether the person erecting the nuisance does it ignorantly or by design, with a good intent or an evil intent; and there is no reason why for such an offence a corporation should not be indicted."¹⁷

"It is well settled upon principle and by numerous decisions, that a railroad company authorized to use locomotive engines are not responsible for damage occasioned by sparks emitted from an engine travelling on their road; provided, they are not guilty of negligence, and have taken due precaution to prevent injury from fire. In suits for such injuries, negligence is the gist of the action, and must be charged in declaration." It was held that the indictment for nuisance was fatally defective because it did not allege a want of care or negligence.¹⁸

16—Chief Justice Green in *The State v. The Morris & Essex R. R. Co.*, 23 N. J. L. 360 (1852).

17—Chief Justice Green in *The State v. The Morris & Essex R. R. Co.*, 23 N. J. L. 360 (1852).

18—*Morris & Essex R. R. Co. v. State*, 36 N. J. L. 553 (Court of Errors & Appeals, 1873).

"Some of the earlier cases held that trespass or case would not lie against a corporation for a private nuisance, but that doctrine has long since been exploded. In early days when corporate bodies were few, it was a matter of comparatively small consequence whether such an action could be maintained. In these days, however, when the great concerns of business are carried on chiefly through these artificial persons, it would be most oppressive to hold that they are not amenable to answer for such wrongs as subject natural persons to prosecution. * * * The Queen v. The Great North of England Railway Co., 9 Q. B. 316, is a leading and instructive case on this subject, showing the advance which the doctrine holding corporations criminally liable had made at the date of that adjudication. The earlier cases are cited there, and the summing up of Lord Chief Justice Denman shows how firmly he held to the idea, that upon reason and policy an indictment could be supported against a corporation for misfeasance as well as for nonfeasance. He entertained no doubt that a corporation may be guilty, as a corporate body, of commanding acts to be done to the nuisance of the community at large. In reply to the suggestion that the individuals who concur in doing the inhibited acts on behalf of the corporation may be indicted, he said, that while of that there was no doubt, there can be no effectual means for deterring from the commission of criminal acts, except the remedy by an indictment against those who truly commit them—that is, the corporation acting by its majority and that there is no principle which places them beyond the reach of the law for such proceedings. In *Commonwealth v. Proprietors of New Bedford Bridge*, 2 Gray, 339, the Massachusetts Supreme Court adopted the same view, declaring that the tendency of the more recent cases in courts of the highest authority has been to extend the application of all legal remedies to corporations, and assimilate them as far as possible in their legal duties and responsibilities to individuals. Mr. Beach, in his treatise on *Private Corporations* (Vol. 11, p. 548), says that the tendency of judicial decision has been to extend the liability of corporations in civil actions for the misfeasance of their agents, so that it is well settled that they may be held liable for libel, malicious prosecution and for assault and battery committed by their agents in the performance of their duties, and in view of the fact that they may in such suits be subjected to exemplary or punitive damages, the assertion that they cannot be held liable to indictment for any offences, which derive their criminality from evil intent, may well be questioned. The very basis of the action for libel or for malicious prosecution is the evil intent, the malice of the party defendant. It is difficult, therefore, to see how a corporation may be amenable to civil suit for libel and malicious prosecution and private nuisance, and mulcted in exemplary damages, and at the same time not be indictable for like offences, where the injury falls upon the public. That malice and evil may be imputed to corporations has been repeatedly adjudged. So far as this question has been agitated in New

Jersey, our decisions have been in line with the cases which have been cited. *State v. Morris Canal Co.*, 2 Zab. 537; *State v. Godwinville*, etc. 49 N. J. L. 266; *McDermott v. The Evening Journal*, 43 N. J. L. 488; *Brokaw v. New Jersey R. R. Co.*, 32 N. J. L. 328. The question whether criminal intent may be imputed to a corporation is not necessarily involved in the discussion of the case before us. The habitual indulgence in the vicious practices on the premises of the defendant corporation stamps it as a disorderly house, without regard to the intent which prompted the disorder.”¹⁹

When, by statute, the duty of building and keeping in repair a public bridge is imposed upon any person or corporation, such person or corporation is liable to indictment at the common law for neglecting such duty, and the allegation *contra formam statuti* will be applied to the statute, as creating the duty, and not as imposing the penalty.²⁰

19—*State v. Passaic County Agricultural Society*, 54 N. J. L. 260 (1892).
Van Syckel, J.

20—*State v. Morris Canal & Banking Co.*, 22 N. J. L. 537 (1850).

VIII. INSOLVENCY AND RECEIVERS.

93. DUTIES OF DIRECTORS IN CASE OF INSOLVENCY.

The Corporation Act provides (§ 63) that whenever any corporation shall become insolvent, the directors, within ten days thereafter, shall call a meeting of the stockholders, and lay before them for inspection and examination all the books of accounts, by-laws and minutes of the corporation, and exhibit a full and true statement of all its estate, funds and property, and of all the debts due and owing to it, and by whom, and of all the debts owing by it, and to whom, as far as the directors can at that time make out the same; so as to exhibit to the stockholders a full, fair and true account of the situation of the affairs of the corporation.

94. JURISDICTION OF THE COURT OF CHANCERY IN RESPECT TO INSOLVENT CORPORATIONS.

A court of equity, in the exercise of its general jurisdiction, may appoint a receiver of a corporation, either because it has no properly constituted governing body, or because there are such dissensions in its governing body as to make it impossible for the corporation to carry on its business with advantage to its stockholders, but this power is always exercised with great caution and only for such time and to such an extent as may be necessary to preserve the property of the corporation and to protect the rights of its stockholders.¹

"But the power to dissolve an insolvent corporation and wind it up is statutory. It formed no part of the original jurisdiction of the court [of chancery]. It was conferred by a statute passed in 1829,² and the language by which it was conferred has remained unchanged from that time to the present. This statute empowers the chancellor, on the application of a creditor or stockholder alleging that the corporation in which he is interested has become insolvent, to proceed in a summary way to inquire into the truth of such allegation, and if, upon such inquiry, it shall be made to appear that the corporation has become insolvent and shall not be about to resume its business in a short time with safety to the public and advantage to the stockholders, he may enjoin it from the further exercise of its franchises and also from the further transaction of business; and he may also, at the same time, or at any subsequent time during the continuance of the injunction,

1—Edison v. Edison United Photograph Co., 52 N. J. Eq. 620 (1894); Laurel Springs Land Co. v. Foucheray, 50 N. J. Eq. 756 (Court of Errors & Appeals, 1893); Sternberg v. Wolff, 56 N. J. Eq. 389 (Court of Errors & Appeals, 1898).

2—An act to prevent frauds by incorporated companies; approved February 16, 1829.

if in his judgment the circumstances of the case and the ends of justice require, appoint a receiver to dispose of its assets and distribute the proceeds. The exercise of this power to its full extent extinguishes a mere manufacturing or mercantile corporation completely and forever.³ The power is a strong one. Chancellor Williamson, in *Rawnsley v. Trenton Life Insurance Co.*, 9 N. J. Eq. 95, called it an extraordinary power—one that should be exercised with great caution, and only when the circumstances of the case and the ends of justice required its exercise. The statute makes insolvency the jurisdictional fact. The court can do nothing—neither issue an injunction nor appoint a receiver—until insolvency is first established. That, in the language of Governor Pennington, is the foundation of the power, and unless it is satisfactorily made out the court has no jurisdiction.⁴ Chancellor Halstead expressed substantially the same view in *Goodheart v. Raritan Mining Co.*, 8 N. J. Eq. 73, 77, and Mr. Justice Depue, in pronouncing the opinion of the court of errors and appeals in *Newfoundland Railroad Construction Co. v. Schack*, 40 N. J. Eq. 222, 226, declared, in describing what averments the bill in such a case must contain, that it was not sufficient that the bill should merely allege that the corporation had become insolvent and had suspended its business for want of funds to carry on the same, but that the facts and circumstances on which the complainant relies to prove insolvency must be set out. If it is necessary that the facts and circumstances showing insolvency must be alleged, it follows necessarily, according to the uniform course of judicial procedure, that if such facts and circumstances are denied, they must be proved before the judicial action asked can be granted. It is thus made manifest that, both according to the plain letter of the statute and the uniform construction it has received, the power of the court in such cases depends exclusively on the fact of insolvency, and that until that fact is clearly established the court can do nothing. The proof in support of a jurisdictional fact must always be clear and convincing, for the court derives its power from the fact, and hence, until the fact is shown to exist it has no power. To doubt in such a case is to deny.”⁵

When insolvency is made out, there still resides in the chancellor, a discretion as to the ordering of the injunction and the appointment of receivers, to be governed by the facts of the case. It may be that the court will find it proper to restrain a company from carrying on further business, and yet leave the directors to settle up its affairs. The court may, at pleasure, grant or reject the prayer in part or in whole. It is necessary that this discretion should be with the court,

3—*Atlantic Trust Co. v. Consolidated Electric Storage Co.*, 49 N. J. Eq. 402 (1892).

4—*Oakley v. Paterson Bank*, 2 N. J. Eq. 173, 176 (1839); *Parsons v. Monroe Manufacturing Co.*, 4 N. J. Eq. 187, 206 (1842); *Brundred v. Paterson Machine Co.*, 4 N. J. Eq. 294, 305 (1843).

5—*Vice-Chancellor Van Fleet in Atlantic Trust Co. v. Consolidated Electric Storage Co.*, 49 N. J. Eq. 402 (1892).

but at the same time, it must not be arbitrarily or unjustly exercised. And if the case come fairly within the provisions of the act, and is one which the legislature intended to provide for, the court is bound to give effect to it, and enforce its requirements.⁶

It is not the duty of the court to use its power in all cases where insolvency is shown. Something more is required. The prerequisites prescribed by the statute are, that it shall be made to appear that the corporation has become insolvent, and, also, that it will not be able to resume its business in a short time with safety to the public and advantage to the stockholders. The power is only to be used when the ends of justice require its exercise. The court should strive in such cases to foster and preserve rather than to strangle or destroy. Thus, where the corporation attacked is shown to be insolvent, but it also appears that its managers are honest and capable, and that they are striving to the best of their ability, with a fair prospect of success, to relieve the corporation from its embarrassment and to put it in a condition where it may prosecute its business successfully, and the property of the corporation is free from judgment or other lien under which it may be sold speedily, at a sacrifice, the court should not interfere. Mere insolvency is not enough to induce the court to act; but to induce it to act, such a state of insolvency must be shown as satisfies it that the corporation will not be able in a short time to resume its business with safety to the public and advantage to the stockholders.⁷

The facts must be examined, and an estimate of the actual condition of the company ascertained. If it be a balancing question, and the course of those who manage its affairs appears to be upright and just, the doubt should be resolved in favor of the rights of the company. "It would be unwise, and against public policy, to seek an occasion for interference with any corporation, so long as they are striving against adversity with an honest purpose, unless their case is hopeless, or their course of action so unfair as to jeopardize the interests of creditors and the public."⁸

After a corporation makes a general assignment for the benefit of its creditors, it may be adjudged insolvent, a receiver appointed, the assignee removed and all further proceedings with regard to such insolvency conducted under the jurisdiction of the court of chancery.

A bill by a creditor will not be dismissed on the ground that it shows proceedings in the United States Circuit Court in New Jersey instituted by the creditor, against the corporation based on diversity of citizenship, in which the federal court has taken full jurisdiction and control over the assets of the corporation, and has placed them in the

6—*Parsons v. Monroe Manufacturing Co.*, 4 N. J. Eq. 187 (1842); *Rawnsley v. Trenton Mutual Life Ins. Co.*, 9 N. J. Eq. 95 (1852).

7—*Atlantic Trust Co. v. Consolidated Electric Storage Co.*, 49 N. J. Eq. 402 (1892); *Cook v. East Trenton Printing Co.*, 53 N. J. Eq. 29 (1894).

8—*Brundred v. Paterson Machine Co.*, 4 N. J. Eq. 294 (1843).

9—*Gilroy v. Somerville Woolen Mills, et al.*, 67 N. J. Eq. 479 (1904).

hands of a receiver for distribution among the creditors, since the action under the Corporation act is essentially a proceeding to fix the *status* of a corporation with reference to the exercise of its franchises, and the matter in dispute is not pecuniary in its nature, so as to confer jurisdiction on the federal court because of diversity of citizenship. In the case of *Gallagher v. Asphalt Co. of America*¹⁰ Vice-Chancellor Stevenson said:

"After giving the subject the very best attention that was possible on my part, aided by the exhaustive and learned and satisfactory briefs and arguments to which I have referred, I have reached the conclusion that the United States circuit court did not undertake to exercise the jurisdiction conferred by the New Jersey statute upon the court of chancery, but undertook to exercise, and did exercise, an entirely distinct jurisdiction, which had been evolved by the decisions of the federal courts during a series of years. And this peculiar jurisdiction seems to be unlike any equitable jurisdiction—general equity jurisdiction—that exists in the State of New Jersey.

"The doctrine is established in a series of federal decisions that the assets of an insolvent corporation constitute a trust fund for creditors. This doctrine was announced a great many years ago by Judge Story. It has been very much criticised. Professor Pomeroy refers to the doctrine as one based upon analogy and metaphor. 2 Pom. Eq. Sec. 1046. But this theory that the ordinary general assets of an insolvent corporation are a trust fund for creditors has been worked out in the federal courts so as to establish a somewhat unique branch of equity jurisdiction. And this is the peculiar situation to which the doctrine has been applied, and which is fully illustrated in this case in the United States circuit court for the district of New Jersey. A general creditor, who, presumably, would be regarded as a beneficiary of the trust fund, has no power to come into a federal court with a bill in order to have the trust fund—the assets of the insolvent corporation of which he is a beneficiary—administered for his protection. He has no power to file a bill to prevent the corporation from dissipating the assets and to get a trustee who will act for him and his co-beneficiaries installed and placed in the possession of the trust fund. The doctrine that the assets are a trust fund is not sufficiently potent to enable the beneficiary to get such relief. But he can come into court as a creditor who has exhausted his remedy at law, alleging his judgment, his execution, the return of the execution unsatisfied, and thereupon, through a creditors' bill, the court will, of course, take cognizance of his grievance and seize the assets of the corporation. But here the peculiarity of the doctrine as worked out comes in, that although that sort of a creditors' suit is generally maintainable for the benefit of the complainant, and the common allegation in the complainant's bill that he

¹⁰—65 N. J. Eq. 258 (1903).

filed his bill for the benefit of all other creditors, is mere surplusage, as Vice-Chancellor Pitney recently pointed out—the case is *Jauch v. De Socarras*, 56 N. J. Eq. 524—I say although, according to the equitable theories that we recognize here a creditor coming into a court of equity with such a bill would act for himself, and would be protected and preferred by the decree of the court, such is not the case as this trust fund doctrine has been wrought out in the federal courts. The court undertakes to seize and sequester the assets of the corporation, but it does it then for the benefit of all the creditors of the corporation. Mr. Justice Brewer points out this peculiar feature—or indicates it—in a recent opinion in the United States supreme court. The whole efficiency of the doctrine that these assets are a trust fund for creditors is found only when a creditor has come in, not directly as a beneficiary of a trust fund, but in a different capacity, in the guise of a creditor who has exhausted his remedy at law and who is seeking to get a preferential payment—for that is what it amounts to—getting a sequestration of the assets for the payment of his debt, to the exclusion of anybody else. But right at this point the federal court stops the creditor and says: ‘You have now qualified yourself to come into court in one capacity, but you are confronted by the trust fund doctrine, and while you can get some relief, the same relief, equal relief, will be accorded to all your co-beneficiaries—all the creditors.’

“One of the most interesting features of this application of the theory that, unlike the case of a natural person, when a corporation becomes insolvent, immediately some sort of a trust is fastened upon its assets for the equal benefit of its creditors, is exhibited in the essential basis of this novel suit, which recognizes and enforces the so-called trust. The complainant cannot come into court as a beneficiary, as I have heretofore remarked; he must come in as a judgment creditor who has exhausted his own personal remedy at law. If by judgment, execution and levy upon all these assets of the insolvent corporation—this so-called trust fund, he can satisfy his debt in preference to all his co-beneficiaries, and even to the exclusion of them all, then he is turned out of the court of equity—the court of equity has no jurisdiction. The court of equity says to him: ‘You cannot have this trust fund administered for the equal benefit of yourself and your co-beneficiaries because you have not proceeded at law to absorb all that part of the trust fund which is leviable and appropriate it to yourself, as you might have done by a judgment and execution.’

“So far as I am aware, we do not recognize in New Jersey any original principle of equity jurisprudence which fastens upon the assets of a corporation, upon its becoming insolvent *eo instanti*, a trust for the equal benefit of all the creditors of the corporation. We do have, however, certain statutes which provide in certain instances and under certain conditions for the equal distribution of the assets of an insolvent corporation and prevent creditors of the corporation from ob-

taining preferences, but this result has been wholly reached by legislation which brings about a condition of things, a relation of the assets of the insolvent corporation to its creditors which, by metaphor and analogy, as Professor Pomeroy says, may be called a trust. A trust does not produce, however, the equality among creditors as beneficiaries of the trust. The statutory provision produces equality from which a result is reached which is in effect the same as if a trust existed." ¹¹

And again, in the same case, at a later time, the same learned jurist said: "What, then, have the federal courts decided as bearing upon the jurisdiction of this court and of their own court under this act? They do not say that a stockholder may maintain this suit in the federal court. There is no discussion of that question. Whether a Pennsylvania stockholder could initiate this proceeding in the United States federal court, I do not know. If the federal courts had decided that matter it would very greatly aid me in determining what the present status of this jurisdictional question is. And in both the cases which have been cited (*United States Shipbuilding Co. v. Conklin*, 126 Fed. 132, and *Land Title and Trust Co. v. Asphalt Company of America*, 127 Fed. Rep. 1), in the opinion of Judge Acheson and in the opinion of Judge Gray, the utmost pains are taken to exclude from consideration the question whether a general creditor, without a judgment or without a lien is qualified to maintain this action, where there is diversity of citizenship, in the United States circuit court. I must confess that if that question had been decided by the federal courts it would throw great light upon the doctrine which the federal courts mean to enunciate, or will yet enunciate in regard to this whole question of jurisdiction. They do not find it necessary for the purpose of maintaining the jurisdiction, in either of these cases, to decide whether the stockholder, being a citizen of another state, can have a standing in the United States circuit court to initiate this suit. Nor do they decide whether the foreign creditor, who had the standing only of a general creditor, an unsecured creditor, can institute it.

"Without discussing the question whether these deliverances of these learned judges are necessarily a part of the *ratio decidendi* of the cases, or are by way of dictum, taking the statements as indicating the law of the federal courts, I can only reach this conclusion: that (and I may say here that the conclusion is based not only upon the deliverances of the federal courts but upon the careful manner in which they abstain from deciding some of these other questions) the doctrine seems to be established by these cases that where the complainant is a creditor of the insolvent corporation, holding a lien upon all or any of the assets of the corporation, he then is qualified under the limitations of the constitution of the United States, of the statutes of the United States and of the rules of practice of the federal equity courts, to come into the circuit court of the United States and prose-

11—*Gallagher v. Asphalt Co. of America*, 65 N. J. Eq. 258 (1903).

cute so much of this action as these learned judges find to be a creditors' suit.

"Now, whether the decision goes any further than that, I freely confess I do not know. I cannot discover upon reading these opinions whether it is held that this injunction that was granted, restraining the corporation from the exercise of its franchises, is the statutory injunction which suspends permanently the power of the corporation to exercise its franchises, or whether it is only an injunction in aid of the effort of the complainant to get payment of his debt by sequestration of the assets of the corporation. I incline to think that the latter is the true view which the federal courts take. These federal courts regard the whole proceeding here as a statutory action for redressing the grievances of creditors, especially for the redress of the grievance of the particular creditor who files the bill. That seems to be the view. And, if that be true, then the injunction is ancillary to the obtaining of that relief. It certainly is noteworthy that the next step in this New Jersey suit, which I have described, in the language of Chancellor Walworth, as an action practically for the forfeiture of the franchises of a corporation, the next step is an order dissolving the corporation. And yet, for some reason, the parties interested refrained from making application to the federal court for an order of dissolution, and two or three weeks ago came here into this court and took such an order, which, of course, has to be filed with the secretary of state. Whether the federal court would have made such an order, or, if so, it would have been such an order as under the statute should be filed, or could be filed, in the office of the secretary of State of New Jersey, I do not stop to inquire. But all of the parties to this litigation seem to have conceded that this court had jurisdiction of that part of the action which is directed toward fixing permanently the status of the corporation. That seemed to be generally conceded.

"And now we come right to the sharp point, whatever they may think in the federal court; no statutory receiver can be appointed in this court excepting at the time when the statutory injunction is ordered or at some time thereafter. In other words, the ordering of the statutory injunction, which places the corporation under disabilities with reference to the exercise of its franchises, is the jurisdictional fact, the condition precedent which must occur before any statutory receiver can be appointed. That, I think, has been the settled rule of the court from the very origin of our statute.

"Now, if the federal courts have entertained this suit simply so far as it is a proceeding to sequester assets for the benefit of creditors, and ancillary to that have granted an injunction, which, of course, they had a perfect right to do, such injunction is not the statutory injunction, and the receiver appointed in the federal court would not therefore get title under our statute. The result would be that this court had full jurisdiction to grant the statutory injunction, which I have held to be the only necessary object of the suit, disabling the corporation, putting it permanently under disabilities, preventing it from exercis-

ing its franchises. I say this court then had jurisdiction to do that. No other court has done that thing, or undertaken to do that thing.

"Of course, I am not either commending or criticising the view of our statutory action which permits its severance into two distinct actions which can be prosecuted in two different courts at the same time. I am merely endeavoring to ascertain the principle controlling the jurisdiction of the federal court and of this court, which seems to have been enunciated in these recent federal decisions, either by way of dictum or otherwise.¹²

95. WHAT FACTS CONSTITUTE INSOLVENCY AND SUSPENSION OF BUSINESS UNDER THE STATUTE.

A corporation may be insolvent and yet not have suspended its business for want of funds to carry on the same. It likewise may have suspended its business for want of funds and still be able to pay its debts if properly wound up. If either fact, insolvency or suspension, exists without the other, the court may entertain the bill and proceed in a summary way to hear the affidavits, proofs and allegations which may be offered on behalf of the parties. The inquiry then goes to the questions "insolvency" and "resumption."

The court is not controlled by the definition of insolvency contained in the Federal Bankrupt act, but must accord to that term the meaning ascribed to it in the courts of this state. Here it has the common law meaning and denotes a general inability to meet pecuniary liabilities as they mature, by means of either available assets or an honest use of credit.¹

It does not follow, therefore, that a corporation is not insolvent within the meaning of the act because it may ultimately have a surplus after winding up its affairs.²

The test is: Can the corporation in the present or near future meet its maturing pecuniary obligations?³

Where a corporation is losing money in the carrying on of its business, and is seriously embarrassed for want of funds to carry out the project for which it was organized, and is without available assets to pay its present indebtedness, notwithstanding there may not have been a complete suspension of its business, it is insolvent within the meaning of the corporation act, and hence is subject to the issuance of an injunction and the appointment of a receiver. Thus in a recent case

12—Gallagher v. Asphalt Co. of America, 67 N. J. Eq. 441 (1904). But see McGraw v. Mott, 179 Fed. 646 (1910).

1—Empire State Trust Co. v. Trustees of Wm. F. Fisher & Co., 67 N. J. Eq. 602 (Court of Errors & Appeals, 1905); National Bank of Metropolis v. Sprague, 21 N. J. Eq. 530 (1870); Skirm v. Eastern Rubber Manufacturing Co., 57 N. J. Eq. 179 (1898).

2—Skirm v. Eastern Rubber Manufacturing Co., 57 N. J. Eq. 179 (1898).

3—Ft. Wayne Electric Corporation v. Franklin Electric Light Co., 57 N. J. Eq. 7 (1898); Reinhardt v. Interstate Telephone Co., 71 N. J. Eq. 70 (1906).

where the debts and obligations of the corporation, including the annual franchise tax presently to become due, amounted to about \$8,000, and its assets were mining property, concerning the value of which there was little or no evidence, cash \$1,200, building \$3,000, machinery \$3,000, wood \$450, stock of tools, steel, etc. \$1,000, and in addition thereto there were some piles of ore which had been taken from the mine, also a claim for \$1,500, Mexican, or \$750 gold, against complainant which was disputed, and the evidence on both sides was to the effect that it would require an expenditure of from \$25,000 to \$30,000 to put the company upon any sort of a paying basis, and it appeared that the ore, by reason of the distance from milling and smelting works and incidental expenses was of little or no value, and the buildings were of little or no value, except to a continuing business, and the indebtedness was pressing, Vice-Chancellor Howell held that the company was insolvent.⁴

The fact that notes of a corporation go to protest is not conclusive evidence of insolvency.⁵

It was held that the allegation of insolvency, made with respect to a railway corporation in a bill for a receiver, was sustained by proof that the corporation had acquiesced in the construction of its road-bed by a companion corporation, which had either paid for or pledged its own credit for the cost of such construction, and that debts honestly due and owing therefor were outstanding and suits pending that the defendant corporation had neither means nor prospects of settling.⁶

In *Parsons v. Monroe Manufacturing Co.*, 4 N. J. Eq. 187 (1842), it was held that, in judging of the solvency or insolvency of a company, its property should be estimated at its full value and not at the depreciated price which it might command at a forced sale, but that the most unfavorable inference as to the condition of a corporation may justly be drawn from the circumstance of the company's withholding its books upon an investigation touching its solvency.

In some of the cases it was contended that the second requirement of section 65 of the Corporation act defines insolvency so broadly as to necessarily include a suspension of business, principally because of the conjunctive construction of the sentence, and that where the company had not entirely suspended its business, the word "resumption" put the case out of the statute.

Chancellor McGill met this argument as follows:

"Before the court can appoint a receiver for this corporation, it must appear—First, that the corporation is insolvent; and, second, that it will not be able to resume its business with safety to the public and advantage to its stockholders within a short time. It is the

4—*Catlin v. Vichachi Mining Co.*, 73 N. J. Eq. 286 (1907).

5—*Regina Music Box Co. v. Otto & Sons*, 65 N. J. Eq. 582 (1903); affirmed 68 N. J. Eq. 801 (Court of Errors & Appeals, 1905).

6—*Tuckahoe & Cape May Ry. Co. v. Baker*, 49 N. J. Eq. 581 (Court of Errors & Appeals, 1892).

contention of counsel that the second requirement of the statute defines the insolvency intended as one that shall include a suspension of the business, while in the case before me, though there be insolvency, the business of the company has not suspended, the electric lighting continues, and receipts therefor come into the treasury. I agree that the word 'resume,' as used in the statute, predicates some interruption of the insolvent's business, but I do not understand that it contemplates an entire suspension of all its workings. Such has not been the practical interpretation the bar and the courts have given it; for manufacturing and other companies with plants in operation have constantly been adjudged to be insolvent and put in the hands of receivers, and in so doing large values have been saved to creditors and stockholders because of the salable condition of a live plant, as compared with one that is dead. Insolvency carries with it inability to presently pay indebtedness, and suspension of that function; and the word 'resume,' used in the statute, is, I think, to be taken in the sense of taking up again that suspended function, so that payment of the indebtedness, as well as the operation of the work of the corporation, after temporary, partial or complete paralysis, may be 'resumed' with safety to the public and advantage to its stockholders. This point was not involved in *Cook v. East Trenton Pottery Co.*, 53 N. J. Eq. 29 (1894), and I do not understand that that case, even in dictum, holds the contrary of the view I have expressed. That the late Vice-Chancellor Van Fleet understood the statute in the way I have interpreted it, I think is manifest in his course of thought in *Atlantic Trust Co. v. Consolidated Electric Storage Co.*, 49 N. J. Eq. 402 (1892), where he suggests an admirable guide in the appointment of receivers for insolvent corporations. He says: 'The principle which I think should control the court in the exercise of this power is this: Never to appoint a receiver unless the proof of insolvency is clear and satisfactory, and unless it also appears that there is no reasonable prospect that the corporation, if let alone, will soon be placed, by the efforts of its managers, in a condition of solvency. To illustrate: Where the corporation attacked is shown to be insolvent, but it also appears that its managers are honest and capable, and that they are striving to the best of their ability, with fair prospect of success, to relieve the corporation from its embarrassment, and to put it in a condition where it may prosecute its business successfully, and the property of the corporation is free from judgment or other lien under which it may be sold speedily at a sacrifice, the court should not interfere.' In the present case, the corporation is incumbered by mortgage under foreclosure, and by judgments and levies is prepared for immediate sale. Its actual management is in the hands of a minority of its directors. The receipts from its business are habitually taken from the state, and are unaccounted for to its directors. No effort is being made to relieve the company from its perilous condition. On the contrary, at the single, but irregular meeting of directors held in

two years, an effort was made to virtually abandon the corporation. I think that a receiver should be appointed. It may be doubtful whether he can accomplish much for the relief of stockholders, but there appears to be a possibility that creditors may be paid through his instrumentality."⁷

Of late years numerous corporations have been adjudged insolvent and receivers appointed therefor without any interruption of their business and before any debt has actually matured without payment, on proof merely that the corporation would be unable to meet its immediately maturing obligations and that a scramble would ensue among its creditors, resulting in inequality of distribution of its assets. It is common practice to declare railroad, gas, water companies and other public service corporations and even ordinary business corporations insolvent, and appoint a receiver, without the least interruption of their public functions.⁸

The act however looks to the suspension of the ordinary business of the company or some overt act by which its insolvency can be ascertained and declared. The court cannot undertake to investigate the financial ability of the corporation at previous periods, founded upon mere failure to meet its engagements.⁹

96. STATUTORY PROHIBITION OF CONVEYANCE AND TRANSFER OF PROPERTY, ETC., BY CORPORATION WHEN INSOLVENT OR IN CONTEMPLATION OF INSOLVENCY.

The Corporation Act provides (§ 64) that whenever any corporation shall become insolvent or shall suspend its ordinary business for want of funds to carry on the same, neither the directors nor any officer or agent of the corporation shall sell, convey, assign or transfer any of its estate, effects, choses in action, goods, chattels, rights or credits, lands or tenements; nor shall they or either of them make any such sale, conveyance, assignment or transfer in contemplation of insolvency, and every such sale, conveyance, assignment or transfer shall be utterly null and void as against creditors; provided, that a bona fide purchase for a valuable consideration, before the corporation shall have actually suspended its ordinary business, by any person without notice of such insolvency or of the sale being made in contemplation of insolvency, shall not be invalidated or impeached.

In the absence of statutory prohibition, a corporation may sell and transfer its property, and may prefer one creditor to another, although it is insolvent.¹

7—*Ft. Wayne Electric Corp. v. Franklin Electric Light Co.*, 57 N. J. Eq. 7 (1898); affirmed 58 N. J. Eq. 579 (Court of Errors & Appeals, 1899).

8—*Reinhardt v. Interstate Telephone Co.*, 71 N. J. Eq. 70 (1906); *Catlin v. Vichachi Mining Co.*, 73 N. J. Eq. 286 (1907).

9—*Bedford v. Newark Machine Co.*, 16 N. J. Eq. 117 (1863).

1—*Wilkinson v. Bauerle*, 41 N. J. Eq. 635 (Court of Errors & Appeals, 1886).

In the Revision of 1874 the statutory prohibition against preferences was omitted, the original act was repealed and the statutory provision now contained in this section was not re-enacted until the Revision of 1896. In the interval, the court of errors and appeals applied the common law rule as stated above, holding that the repeal of the original act clearly indicated a legislative intent to prohibit no longer the acts which that section had been construed to prohibit.²

It was held, however, that the board of directors of an insolvent corporation could not, by mortgage upon the corporate property, secure to one of the directors the payment of an antecedent debt due by the company to such director, or a previous liability incurred by such director for the corporation. A mortgage had been made by a solvent company to one of its directors, under an arrangement that such mortgage should be kept from record for the purpose of strengthening the credit of the company, while the directors should test the success of the corporate business at the risk of future creditors, and the mortgage was not recorded until the corporation became insolvent. On the ground of the fiduciary relation of the director it was held, however, that the mortgage was void.³

The object of the statute was to prevent a company that was either insolvent, or in contemplation of insolvency, from preferring some creditors to others. The proviso is intended to protect a stranger, who, in good faith and in total ignorance of the situation of the company, makes a purchase of its property, and pays down the consideration money. But all precedent creditors of the company must stand on the same footing.⁴

It is not the purpose of the act, however, to deprive the officers of an incorporated company of the power to conduct the business of the company, by so disposing of its property that its insolvency may be avoided or remedied, if such action is taken in good faith, and secures to the company a full and fair consideration passing coincidently with the transfer of its property in the conduct of its business. Such dealings are in no sense frauds. The company's assets after such a transaction, though changed in their nature, are still intact as to value and ability to respond to creditors. If a mortgage be so made, it stands for the property sold or transferred in good faith. But the act is intended to prevent the officers from disposing of the company's assets to those of its creditors who are favored by the officers. Such preferential transactions by officers of corporations have always been held to be prohibited while this statute was in operation, and to have been permissible while it was off the statute-books.⁵

2—*Wilkinson v. Bauerle*, 41 N. J. Eq. 635 (Court of Errors & Appeals, 1886); *Vail v. Jameson*, 41 N. J. Eq. 648 (Court of Errors & Appeals, 1886).

3—*Montgomery v. Phillips*, 53 N. J. Eq. 203 (Court of Errors & Appeals, 1895).

4—*Wells v. Rahway White Rubber Co.*, 19 N. J. Eq. 402 (1869); *Coryell v. New Hope Delaware Bridge Co.*, 9 N. J. Eq. 457 (1853).

5—*Wilkinson v. Bauerle*, 41 N. J. Eq. 635 (Court of Appeals, 1886);

The provisions of this and the following sections are, therefore, construed as requiring the affairs of any incorporated company becoming insolvent to be put in a train of proceedings (the form of which is prescribed) whereby its property may be distributed among its creditors, and as forbidding the preference of any creditor after insolvency known or contemplated.⁶

In a recent case the defendant contended that the only test of insolvency which, under the statute, can be applied is whether the corporation had at the time the challenged act was done, actually suspended its business, relying upon the language of Chancellor Green, in *Bedford v. Newark Machine Co.*, 16 N. J. Eq. 117, 120 (1863), that the suspension of its ordinary business is the only criterion which the statute gives to ascertain the insolvency of companies other than banks. The court said, however: "A reading of the terms of section 64 will show that the prohibition it contains becomes applicable whenever the corporation becomes insolvent, or suspends its ordinary business for want of funds to carry on the same, or when the prohibited act is done in contemplation of the company's insolvency. Here are three contingencies, any of which existing, the company's officers are precluded from transferring its property. What is meant by insolvency has been defined by this court and the court of appeals so clearly that there ought not to be any further question about it. A review of the cases may be found in the opinion of Vice-Chancellor Reed, in the case of *Skirm v. Eastern Rubber Manufacturing Co.*, 12 Dick. Ch. Rep. 184. The court of appeals, in *National Bank v. Sprague*, 6 C. E. Gr. 538, declared that 'insolvency means a general inability of a debtor to answer pecuniary engagements, and it does not follow that he is not insolvent because he may ultimately have a surplus after winding up his affairs.' It seems but a fair construction of the records 'suspend its ordinary business for want of funds,' etc., to hold that they include the suspension of payment of the company's debts in the usual conduct of trade."⁷

"To contemplate insolvency within the meaning of the act, is to have in mind something more than the mere possibility of insolvency. The failure of his debtors to make prompt payment, the occurrence of some unexpected event, the stringency of the money market, may create an apprehension in the mind of the manufacturer that he may be unable to meet his obligations as they mature. He may, for the

Savage v. Miller, 56 N. J. Eq. 432 (Court of Errors & Appeals, 1897), and cases cited; *Reed v. Helois Carbide Co.*, 64 N. J. Eq. 231 (1902); *Miller v. Gourley*, 65 N. J. Eq. 237, 251 (1903).

⁶—*Wilkinson v. Bauerle*, 41 N. J. Eq. 635 (Court of Errors & Appeals, 1886); *Coryell v. New Hope Bridge Co.*, 9 N. J. Eq. 457 (1853); *Van Wagenen v. Savings Bank*, 10 N. J. Eq. 13 (1854); *State Bank v. Receiver*, 3 N. J. Eq. 266 (1835); *Receivers v. Paterson Gas Co.*, 23 N. J. L. 283 (1852); *Kinsela v. Cataract Bank*, 18 N. J. Eq. 158 (1866); *Wells v. Rahway White Rubber Co.*, 19 N. J. Eq. 402 (1869).

⁷—*Miller v. Gourley*, 65 N. J. Eq. 237, 253 (1903); see also cases cited under § 95 above.

moment, be doubtful whether he will or will not be able to go on. If he succeeds in borrowing enough money to pay his obligations and goes on, he cannot be said to have contemplated insolvency at the time he borrows the money, merely because he had in mind at some former time the possibility of becoming insolvent in case he failed to borrow it. This is the language of common sense, no less than of the authorities. In Webster's dictionary, it is said 'we contemplate a design when the means are at hand and our decision is nearly or quite made.' In Burrill's Law Dictionary, contemplation is defined as 'having in view; consideration of an act or course of conduct with the intention of doing or adopting it.' In *Buckingham v. McLean*, 13 How. (U. S.) 167, contemplation of insolvency is spoken of as a contemplation of an inability to pay, as debts should become payable—'whereby a man's business is broken up.' In *Belcher v. Prittie*, 10 Bing. 423, Justice Bosanquet says: 'The more important part of the case is whether this was done in contemplation of bankruptcy;' in other words, 'whether Mr. M., at the time he assented to this proposal of his son (a proposal to secure certain indebtedness) expected that bankruptcy would take place; * * * whether he knew, or believed, upon the 1st of July that his affairs would end in bankruptcy.' To illustrate: When Gustave Otto found that the Paillard failure had made it necessary for his company to raise money, he probably said to himself: 'My company must either borrow \$40,000 in cash or suspend business.' He was then contemplating insolvency on a contingency; but when he was informed that Mr. Jenkins was willing to lend the money, the contingency on which he had contemplated it not having happened, the idea of insolvency ceased to be present to his mind and he no longer contemplated it. When his company executed the mortgage he contemplated, not insolvency, but the reverse.

"Any other construction of the statute would make it impossible for a corporate manufacturer, temporarily in need of money, to procure it by pledge of his property, although by procuring it he would terminate his embarrassment. The lender's security would always be open to attack, and successful attack, if at any time in the future the borrower failed." ⁸

The statute makes a distinction between the case of an antecedent debt and the case of a bona fide purchase for valuable consideration paid at the time by a person without notice. In the former case, if the company be, in fact, insolvent, or if it contemplate insolvency, the ignorance of the creditor is immaterial.⁹

The knowledge, information and notice of the insolvency cannot depend, however, on mere constructive notice, or what will put the party on inquiry only. The terms of the act imply knowledge either

⁸—*Regina Music Box Co. v. Otto & Sons*, 65 N. J. Eq. 582 (1903); affirmed 68 N. J. Eq. 801 (Court of Errors & Appeals, 1905).

⁹—*Regina Music Box Co. v. Otto & Sons*, 65 N. J. Eq. 582 (1903); affirmed 68 N. J. Eq. 801 (Court of Errors & Appeals, 1905).

of the party himself, or imparted to him by someone who had that knowledge, and not mere suspicion, supposition, or belief of himself or of another, imparted to him.¹⁰

But this rule does not apply in the case of corporate officers. Thus where the president and treasurer of a corporation paid to themselves claims due from it, within ten days of its insolvency, they were charged with knowledge thereof, and required to refund.¹¹

Nor will the court infer bad faith. Thus in *Shinn v. Kummerle*, 72 N. J. Eq. 828 (1907), Vice-Chancellor Leaming refused to set aside a judgment against it in favor of the wife of its president resulting from his activity in her behalf and the purposeless inaction of the remaining directors.

A mortgage or other transfer of the property of a corporation is void, if made when the corporation is insolvent, or after it has suspended business, although the corporation was solvent and had not suspended business when the resolution was passed authorizing the execution of such mortgage or transfer.¹²

Where the directors of an insolvent corporation ordered that corporate property should be transferred to two of their number, who agreed to pay certain creditors, and the remaining property was insufficient to pay the corporate debts, it was held that the transfer was made in contemplation of the corporation suspending business by reason of its insolvent condition and void under the statute, and that the receiver of the corporation was entitled to recover from each transferee the value of the property received by him. One of the directors who paid debts of the corporation in consideration of the transfer, was held to be entitled to be subrogated to the rights of the creditor to the extent of the debts.¹³

An officer of a corporation paid \$25,000 for property purchased for it. He received its bond to that amount on that account and subsequently the company, when insolvent, adopted a resolution pledging to him \$15,000 more bonds as collateral. At the time the \$25,000 was paid, the understanding was that he should receive bonds as collateral only to that amount. It was held that the resolution was void as an attempt in contemplation of insolvency to protect the officer and in violation of the provisions of the act.¹⁴

A shipbuilding company under contract to construct a vessel for another company became unable, for want of funds, to proceed, and it suspended business. The latter company had paid the instalments called for, except \$9,000 of an instalment which was withheld because of the unwillingness of the company to trust the corporation. The shipbuilding company mortgaged its property to the other company

10—*Kinsela v. Cataract City Bank*, 18 N. J. Eq. 158 (1866).

11—*Jessup v. Thomason*, 68 N. J. Eq. 443 (1904).

12—*Wells v. Rahway White Rubber Co.*, 19 N. J. Eq. 402 (1869).

13—*Mills v. Hendershot*, 70 N. J. Eq. 258 (1905).

14—*Porch v. Agnew Co.*, 70 N. J. Eq. 328 (1905); affirmed 71 N. J. Eq. 305 (Court of Errors & Appeals, 1906).

for an amount in excess of the contract price to enable the latter company to raise money to meet further payments called for. The company paid the \$9,000 and later advanced \$1,500. The financial condition of the shipbuilding company was known to the other company. It was held that though the parties in good faith expected that the giving of the mortgage would enable the shipbuilding company to continue its business, the mortgage was given in contemplation of insolvency and was void, except as to the \$1,500 advanced.¹⁵

A mortgage may be a good security for some component parts of the mortgage money and bad as to the residue of it. Thus, in one case certain stockholders were indebted to the corporation for the price of shares of its capital stock issued to them, and by arrangement between these stockholders of the company it was agreed that the price they owed for the shares should be by the stockholders expended in the purchase of land for the company's factory site, and the price and other money was so expended by them. One of the two shareholders took title to the land in his own name. He subsequently conveyed the land to the company which then gave to the two shareholders a mortgage securing payment to them of the amount of money expended. It was held that the mortgage, so far as it secured to the stockholders the repayment of the price of their shares, was invalid as to creditors of the company and also as to other stockholders. But such mortgage was held to be a valid security to the extent that it secured other presently passing considerations.¹⁶

Where it appeared that a corporation had actually ceased to do business, and that certain notes were paid after protest, a contention that they were paid in the ordinary course of business was held to be without merit.¹⁷

A mortgage given merely to secure antecedent debts is not given for "a valuable consideration," within the meaning of the act.¹⁸

A sale made in violation of the act may be avoided at law, by attachment or replevin, as well as in equity.¹⁹

In a suit attacking a chattel mortgage under the act, the receiver is not limited in challenging the defendant's wrongful acts to those done after his appointment.²⁰

Under clause (e) of section 70 of the Federal Bankrupt act, trustees in bankruptcy may avoid a mortgage made by a New Jersey cor-

15—Barrett v. Perth Amboy Ship Building, etc., Co., 73 N. J. Eq. 62 (1907).

16—Reed v. Helols Carbide Specialty Co., 64 N. J. Eq. 231 (1903); see also Miller v. Gourley, 65 N. J. Eq. 237 (1903).

17—Miller v. Audenried, 67 N. J. Eq. 252 (1904); affirmed 68 N. J. Eq. 658 (Court of Errors & Appeals, 1905).

18—Empire State Trust Co v. Trustees of Wm. F. Fisher & Co., 67 N. J. Eq. 602 (Court of Errors & Appeals, 1905).

19—Schmidt v. Perkins, 74 N. J. L. 785 (Court of Errors & Appeals, 1907).

20—Pryor v. Gray, 70 N. J. Eq. 413 (1905); affirmed 72 N. J. Eq. 436 (Court of Errors & Appeals, 1907).

poration which the creditors of the corporation might avoid under the act.²¹

97. PROCEDURE IN CHANCERY IN CASE OF INSOLVENCY.

Whenever any corporation shall become insolvent or shall suspend its ordinary business for want of funds to carry on the same, any creditor or stockholder may by petition or bill of complaint setting forth the facts and circumstances of the case, apply to the court of chancery for a writ of injunction and the appointment of a receiver or receivers or trustees, and the court being satisfied by affidavit or otherwise of the sufficiency of said application, and of the truth of the allegations contained in the petition or bill, and upon such notice, if any, as the court by order may direct, may proceed in a summary way to hear the affidavits, proofs and allegations which may be offered on behalf of the parties, and if upon such inquiry it shall appear to the court that the corporation has become insolvent and is not about to resume its business in a short time thereafter with safety to the public and advantage to the stockholders, it may issue an injunction to restrain the corporation and its officers and agents from exercising any of its privileges or franchises and from collecting or receiving any debts, or paying out, selling, assigning or transferring any of its estate, moneys, funds, lands, tenements or effects, except to a receiver appointed by the court, until the court shall otherwise order.¹

The Court of Chancery, at the time of ordering said injunction, or at any time afterwards, may appoint a receiver or receivers or trustees for the creditors and stockholders of the corporation.²

The proceeding against an insolvent corporation under the Corporation Act is summary in its character and strictly in rem. Its main object is to put the property of the corporation in the custody of the law, so that its proceeds may be applied in due course of administration to the payment of the debts of the corporation.³

Where a creditor or stockholder comes into court under this act, it is not his particular grievance the court is to redress, or his individual interest that is to be protected; but the very object of the act is to protect the public at large from imposition, and to promote and secure the general interest of the stockholders and creditors.⁴

A bill in such a proceeding which embraces the ground of insolvency under the corporation act and also a distinct action based upon the general equity jurisdiction of the court against the same alleged insolvent corporation, and other defendants, is multifarious.⁵

21—*Empire State Trust Co. v. Trustees of Wm. F. Fisher & Co.*, 67 N. J. Eq. 602 (Court of Errors & Appeals, 1905).

1—Corporation Act, § 65.

2—Corporation Act, § 66.

3—*Albert v. Clarendon Land Investment & Agency Co.*, 53 N. J. Eq. 623 (1895).

4—*Rawnsley v. Trenton Mutual Life Ins. Co.*, 9 N. J. Eq. 95 (1852).

5—*Pierce v. Old Dominion, etc., Smelting Co.*, 67 N. J. Eq. 399 (1904).

"This proceeding," said Vice-Chancellor Stevenson in a recent case, "had its origin in an act of the legislature of the state of New York, passed in 1825. The statutory remedy was prosecuted under that act by the attorney-general of the state, although a creditor was permitted to bring the suit himself. If you go to the very origin of our act you find that the legislative intent is to provide a means by which, on behalf of the public, the corporate existence or the corporate operations of a creature of the legislature may be terminated and by which, to use a briefer expression, corporate franchises are declared forfeited to the state. That is the fundamental conception of this whole statutory proceeding. It is not a proceeding by a creditor to collect a debt. It is not a proceeding by a stockholder to enforce his rights as a member of the corporation. The legislature of the state of New Jersey passed the first act, the act which now exists in the form of sections 65 and 66 of our present Corporation act, following this New York model as a part of an act to prevent fraud by incorporated companies. It was not an act regulating a creditor's suit. It was a radically different statute from the one that I referred to last week, enacted by the legislature of Delaware, by which, when a corporation becomes insolvent, it is liable to have its assets seized, sequestered and administrated for the benefit of creditors. The fundamental idea of the act was to prevent a corporation from going on in business when the interests of the stockholders and the safety of the public, including of course, the stockholders and creditors, required that its franchise should be forfeited to the state. That is indicated in the title of the act, and every provision of the statute bears out that construction. It is true that the legislature saw fit to permit this statutory remedy for the protection of the public and the prevention of fraud to be instituted by any stockholder or any creditor. But it does not follow from that that what was done was to establish a stockholders' suit or a creditors' suit. The fact that it was not a creditors' suit is sufficiently indicated by the alternative—either a stockholder or a creditor may institute the suit. If, when a creditor institutes it it is a creditors' suit, it would seem to follow that when a stockholder institutes it then it is a stockholders' suit. Now, the slightest reflection upon the nature of a creditors' suit against a corporation and a stockholders' suit against a corporation will show how radically different those two things are. When we have either a creditor or a stockholder, qualified to appear as the actor, to set in motion the machinery of the court for the accomplishment of justice, for securing this important remedy on behalf of the public for the prevention of fraud, certainly there is a very strong indication that what the statute is aimed to secure is the redress or the prevention of a public wrong rather than the enforcement of a private right—a private right either of a stockholder *qua* stockholder, or of a creditor *qua* creditor. About forty or fifty years ago, Chancellor Williamson, in the leading case of *Rawnsley v. Trenton Life Insurance Co.*, 9 N. J. Eq. 95, said

with that clearness which characterized almost everything that he ever did say, it is not the particular grievance of the party complainant which is redressed in this proceeding; it is the public grievance. I am giving substantially his language; I have recently had occasion to quote it in an opinion. It is not, he says in substance, the private interest of the party complainant; it is the public interest which is cared for, including the general interest of the stockholders and creditors. The view that I entertain of the character of this proceeding is that it is more in the nature of a public action brought not in the name of the attorney-general but brought by direction of the state in the name of any person who, as stockholder or creditor, is so interested in the assets of the corporation as to have an interest in instituting the statutory suit. We find the same principle illustrated throughout our jurisprudence. A criminal law is enforced, or a quasi criminal law, by *qui tam* actions, actions for penalties, where private prosecutors are allowed to intervene. The state relies upon the private individual to institute the action, the primary object of which is the protection of the state. I take it that in this case the substitution in New Jersey of the attorney-general as the necessary actor in this case by any stockholder or any creditor was made simply because the legislative policy could be, would be inevitably, carried out more fully in greater numbers of instances by leaving the power to institute the proceedings with a stockholder or a creditor—any stockholder, or any creditor; because that being so, as soon as the condition came into existence, which it is the intention of the act to prevent or to remedy, some stockholders or some creditor would have sufficient interest in the assets which would be distributed as the result of the final decree to set the machinery of the court in motion to accomplish directly the object, and only essential object, of the suit, namely, the placing of the corporation under disabilities with reference to the exercise of its franchises. That this is not a creditors' suit, but that it is such a quasi public proceeding, I think is well illustrated by the fact that the suit can be prosecuted to a final decree and the corporation can be placed under disabilities, and then an order can be made dissolving the corporation, precisely as has been done in this case, without administering any assets and without there being any assets capable of administration by this court. I might say in this connection that Chancellor Walworth indicated this view of the New York statute within five or six years after its was first passed. I cited the case in my former opinion in this case. * * * In this connection it is worth while to note that, according to the well-settled doctrine of this court, while this suit is an action inter partes down to the time for the decree for an injunction, it then ceases to be an action inter partes, the complainant no longer controls the cause, and the stockholders and creditors have to be brought in. I never heard of a decree fixing the status of the corporation as one under disabilities, with reference to the exercise of its franchises being vacated without notice to all

the stockholders and all the creditors of the corporation. That is the sort of a status you have as the result of a decree in this suit in rem. Very many of our chancellors have remarked—I think, certainly, the idea is expressed in a number of reported cases, that in fact all of the stockholders and all of the creditors constitute a single party complainant in this proceeding. This statement is based on the idea that the actor who originates the proceeding is not acting in a private capacity, merely coming into court with his own private grievance as a creditor and seeking a means of collecting his debt. Nor is he acting on his own behalf and as the representative of creditors with a common grievance which such creditors as a class, have against the defaulting debtor corporation. Nor is he acting, in case he is a stockholder, on behalf of the stockholders as a class for the redress of any injury to the rights of such stockholders. When a corporation is hopelessly insolvent, its stockholders are interested in a variety of ways in having its activities perpetually enjoined and its assets equitably administered. In the same case creditors have a very great interest, in some respects the same but in others widely different from that of the stockholders. The public at large, as has so often been pointed out, has a further distinct interest in preventing an insolvent corporation from contracting obligations and continuing its business operations in which it may deceive new parties and thereby perpetrate fraud. All these parties complainant, with their various and different injuries to prevent or injuries to redress, unite in securing the accomplishment of their respective purposes by having our statutory action prosecuted to a decree which disables the insolvent corporation from exercising its franchises. The extent to which the various classes to which I have referred derive any benefit from the prosecution of the statutory action to a final decree, or beyond that point, of course, depends upon the circumstances of each particular case.

“Although the statute does not provide that the bill or petition shall state that it is filed on behalf not only of the petitioning stockholder or creditor but for the benefit of all the stockholders and creditors who come into the suit—although such statement is unnecessary in the bill or petition—it is almost universally inserted. While there may be some difference of opinion as to the right of a stockholder or creditor to force his way into a pending suit and be made a party complainant, I strongly incline to the view that, subject to the regulation by the court, such intervention will be allowed, and the particular stockholder or creditor who has started the suit cannot arbitrarily exclude these other parties equally interested from coming into a suit which, when the decree goes, confessedly will be beyond his control. At any rate, it is the uniform practice to admit stockholders and creditors who apply to be made parties complainant, and while I have not lately looked into the matter I do not recall any case where it has been directly held that the original complainant or petitioner can ar-

bitrarily prevent such intervention.”⁶ “The status of the corporation is permanently fixed by the decree. ‘But the status is not the status of a corporation as insolvent. It is the status of a corporation with respect to the exercise of its franchises. The status that is determined and fixed by the decree is that of a corporation under disabilities, enjoined from exercising its franchises. This status corresponds very nearly with that which is established by the ordinary decree or order in the case of proceedings *de lunatico inquirendo*, or in relation to drunkards, spendthrifts, etc., which result in placing a natural person under disabilities. This decree, under our statute, places the corporation under disabilities, and that is the direct object of the suit, and in large numbers of instances of necessity might be the sole result of the suit, although practically a stockholder or creditor of an insolvent corporation would hardly be induced to prosecute a somewhat expensive suit in equity unless after the direct object of the suit had been obtained he saw as an incidental result some advantage to himself. Now, I think it will be perceived that our statutory suit is a proceeding more in the nature of a *quo warranto* than a creditors’ bill for a receivership. In the case of a creditors’ bill, the direct object is the sequestration of the assets by a receiver, and any injunction is ancillary to that object. If there are no assets, and consequently no receivership, it would be a strange case which would afford any function for an injunction. On the other hand, in the case of a *quo warranto* suit, the direct object is to procure a forfeiture of the corporate franchises—practically corporate death—and a receivership in those states where there can be a receivership in a *quo warranto* case is purely ancillary and dependent upon the necessities of the particular case—dependent upon the existence of assets to be received and distributed. That the appointment of a receiver is not the direct object of our statutory suit against an insolvent corporation, that such appointment is purely ancillary, and may or may not be made, according to circumstances, follows, it seems to me, from the fact that our statutory suit may be maintained against a corporation which has not a dollar of assets and has no expectation of ever having any.”⁷

The meaning of the word “creditor,” as used in the statute in defining the classes of persons who are authorized to maintain this statutory proceeding, has been discussed in several cases.⁸

It is settled that the word “creditor” is not used in the statute in a

6—Gallagher v. Asphalt Co. of America, 67 N. J. Eq. 441 (1904).

7—Stevenson, V. C., in Gallagher v. Asphalt Co. of America, 65 N. J. Eq. 258 (1903).

8—Rosenbaum v. United States Credit System Co., 61 N. J. L. 543 (Court of Errors & Appeals, 1898); Ft. Wayne Electric Corporation v. Franklin Electric Light Co., 57 N. J. Eq. 16 (1898); Spader v. Mural Decoration Manufacturing Co., 47 N. J. Eq. 18 (1890); Bolles v. Crescent Drug Co., 53 N. J. Eq. 614 (1895); New Jersey Insurance Co. v. Meeker, 37 N. J. L. 282 (1875).

narrow, technical sense. "It is used in a broad sense, and I think it is safe to say that the general intention is that if a party is so related to the corporation and its assets as to be entitled to a share of what is divided among creditors—if the party can come into the proceedings as a claimant and prove his claim so as to be entitled to a dividend, it must be generally true that he is qualified as a creditor to institute the proceedings which result in the distribution of the assets in part to himself."⁹

The Act of March 23, 1881 (P. L. 1881, p. 184; Gen. Stat. p. 2112), regulating suits on bonds secured by mortgages (see Part II of this book) does not prevent a bondholder or coupon holder from instituting insolvency proceedings.¹⁰

The fact that creditors institute the proceedings with ulterior purposes of self-advantage, will not defeat the proceedings.¹¹

To enable one as a stockholder to institute proceedings under the corporation act to have a corporation declared insolvent, he must be the beneficial owner of some of its stock, by virtue of which he has an interest in the assets of the corporation.¹²

Thus where the complainant in insolvency proceedings had transferred all his stock in defendant company to another corporation in exchange for the stock of the latter and received back from it a single share, which he endorsed in blank and returned, such stock being transferred to him for the sole purpose of enabling him to qualify as a director in defendant company, it was held that he was not a stockholder thereof within the meaning of the act.¹³

Where complainant in fact owns stock in defendant corporation, he may sue, though the stock stands in the name of the broker by whom it was purchased for complainant.¹⁴

And the holder of a voting trust certificate of beneficial interest in shares may sue.¹⁵

An application for the appointment of a receiver of a corporation on the ground of its insolvency, is not defeated by proof that the misfortunes of the corporation are due to the wrongful conduct of com-

9—Gallagher v. Asphalt Co. of America, 65 N. J. Eq. 258 (1903); holding that holders of certificates of indebtedness issued under a deed of trust were "creditors;" see also Ft. Wayne Electric Corporation v. Franklin Electric Light Co., 57 N. J. Eq. 16 (1898).

10—Reinhardt v. Interstate Telephone Co., 71 N. J. Eq. 70 (1906).

11—Ft. Wayne Electric Corporation v. Franklin Electric Light Co., 57 N. J. Eq. 16 (1898); Catlin v. Vichachi Mining Co., 73 N. J. Eq. 286 (1907).

12—Hoopes v. Basic Co., 69 N. J. Eq. 679 (1905); affirmed 72 N. J. Eq. 426 (1907).

13—Hoopes v. Basic Co., 69 N. J. Eq. 679 (1905); affirmed 72 N. J. Eq. 426 (Court of Errors & Appeals, 1907).

14—Reinhardt v. Interstate Telephone Co., 71 N. J. Eq. 70 (1906); see also O'Connor v. International Silver Co., 68 N. J. Eq. 67; affirmed 68 N. J. Eq. 680 (1905).

15—O'Grady v. United States Independent Telephone Co., 71 Atl. 1040 (Court of Errors & Appeals, 1909).

plainant. Any creditor or stockholder has a statutory right to apply for a receiver, and the application not being for the individual benefit of the applicant, the court must ascertain whether insolvency exists and whether a receivership is necessary to secure to the creditors an equal distribution of the assets, or whether on the other hand, the company will be able in a short time to resume its business with safety to the public and advantage to its stockholders. But where the evidence justifies the belief that creditors will be paid and the business of the corporation resumed if a receiver is not appointed, a receiver will not be appointed.¹⁶

The question whether the complainant is a stockholder and so entitled to sue may be tested in a summary manner by plea in case the suit is commenced by bill or by answer in case it is instituted by petition.¹⁷

The practice is to make the corporation the sole defendant in the suit.

"In some reported instances, another defendant has been joined with the alleged insolvent corporation without objection. *American Ice Machine Co. v. Paterson Steam, etc., Co.*, 22 N. J. Eq. 72; *Goodheart v. Raritan Mining Co.*, 8 N. J. Eq. 73. In these cases, however, and in others not reported, where such joinder has occurred, the additional defendant has been brought in, I think, uniformly, merely because some injunction was prayed for against him in aid of the forfeiture proceedings against the defendant corporation. How far, in this statutory action against an insolvent corporation, it is permissible to make other parties than the corporation defendants in order to aid the effectual prosecution of the action against the corporation, perhaps may not be entirely settled. I think, however, that there is no case—certainly not one which would now be regarded as an authority—where this court has entertained in one bill the statutory action in the nature of a quo warranto against an insolvent corporation and a distinct action based upon the general equity jurisdiction of the court against this same alleged insolvent corporation and numerous other defendants who are made parties to the bill. It could hardly be contended that such a joinder is possible where the statutory action is instituted by a petition and not by a bill. Our statutory action, as we have seen, is an action in rem, and results in fixing the status of the corporation in respect of the exercise of its franchises. There seems to be no more room for a second or a third defendant than there is in an action to have a person or corporation adjudged an involuntary bankrupt, or in an information in the nature of a quo warranto to have judgment of ouster against a corporation in a court of law. Of course, if our statutory action could be properly regarded merely as a creditor's suit to sequester and distribute the assets of a corporation, such as is provided for by the Delaware statute and the provisions of the revised

16—*McMullin v. McArthur Electric Mfg. Co.*, 73 N. J. Eq. 527 (1907).

17—*Hoopes v. Basic Co.*, 69 N. J. Eq. 679 (1905); affirmed 72 N. J. Eq. 426 (1907).

statutes of New York above referred to, or could be deemed similar in nature to the equitable action in this court to reach unpaid stock subscriptions (*Wetherbee v. Baker*, 35 N. J. Eq. 501), the joinder of other parties as defendants with the corporation defendant would present a very different aspect." ¹⁸

The chancellor has no right to act in the premises except on the case made before him. The bill or petition, the act expressly says, must set forth the facts and circumstances of the case. Affidavits and proofs may be read, but for no purpose except to sustain the case made by the bill, and by the opposite party in its disproof and denial. "It will not do simply to charge that the company is insolvent, and then take affidavits to show facts and circumstances not alluded to in the bill, to make out such insolvency. It is no trifling matter for the court, where the legislature have incorporated a company with extensive powers, by the exercise of which a large amount of capital has been employed, and in which thousands of our citizens have become interested and their property involved, to strip it in a summary way of all its franchises and privileges, and determine the rights of individuals connected with it. It is a case where the court is to exercise great caution; and I think I may safely say, where a single stockholder, together with a creditor of the company, files a bill under this act, if the bill, taking all the facts and circumstances stated as true, will not justify the issuing of an injunction; no affidavits, or proofs, respecting the collateral matters, though they tend to prove the company insolvent, will justify the court in granting the prayer of the bill. The complainant may amend his bill, and make a case upon which the court can act. But it would be in violation of the well established practice of this court, and I think unjust, for the court to exercise the powers conferred by this act of the legislature, unless the facts and circumstances of the case, as set out in the bill, would warrant it. It is a summary proceeding, and, in its nature and effect, a final hearing upon its merits. By every principle of practice and pleading, the proofs must be pertinent to the issue: *secundum allegata*." ¹⁹

No process ever need be issued and no process in case the proceedings are begun by petition is prescribed by the statute. The court gains jurisdiction by the giving of "reasonable notice" to the defendant corporation. Upon service of such reasonable notice on the return day of the order to show cause, the corporation is as much under the jurisdiction of the court as if a subpoena or a summons had been served upon it by a sheriff or other public officer.²⁰

"On the return day of the order to show cause the statute pre-

18—*Pierce v. Old Dominion, etc., Smelting Co.*, 67 N. J. Eq. 399 (1904).

19—Chancellor Williamson in *Rawnsley v. Trenton Mutual Life Ins. Co.*, 9 N. J. Eq. 95 (1852); see also *Newfoundland Railroad Construction Co. v. Schack*, 40 N. J. Eq. 222 (Court of Errors & Appeals, 1885).

20—*Pierce v. Old Dominion, etc. Smelting Co.*, 67 N. J. Eq. 399 (1904).

scribes a 'summary' hearing of the 'affidavits, proofs and allegations which may be offered on behalf of the parties.' Under our modern practice in the vice-chancellors' courts, this summary hearing often is, and always will be, where justice so requires, a complete trial of the issues presented by the pleadings. The defendant corporation may present an answer or only affidavits, or may, without answer or affidavits, contest the charges contained in the complainant's petition or bill. Under the old practice, where the proofs in equitable actions were in the form of depositions, the very sharp distinction between an interlocutory motion for a receiver in an ordinary equity suit and this summary final hearing in our statutory action, would naturally not be so perceptible as it is at the present time."²¹

"As I have intimated, the older reported cases may sometimes mislead, because under the former practice of this court the summary hearing provided by the statute might in form be the same proceeding as a motion for an injunction, or a motion to dissolve an injunction. Oftentimes the parties, by consent or without question, submitted the controversy over the status of the corporation to the judgment of the court upon the bill, answer and accompanying affidavits, without seeking to produce any further testimony. In some instances it may be that the rules applicable to motions for preliminary injunctions were, without question, applied to the situation. Sometimes, however, depositions were taken and affidavits were served and read in a manner not permitted by the practice regulating motions for injunctions. *Parsons v. Monroe Manufacturing Co.*, 4 N. J. Eq. 192, 202.

"In *Rawnsley v. Trenton Mutual Life Insurance Co.*, *supra*, Chancellor Williamson held that the exercise of the powers conferred by the statute upon the court of chancery with respect to the issuing of an injunction against an insolvent corporation, was 'a summary proceeding and in its nature and effect a final hearing upon' the merits of the bill of complaint. And the same learned chancellor allowed the complainant to proceed with his cause to a final hearing on the 'pleadings and proofs.' 9 N. J. Eq. 347. This case is reported twice. The earliest report shows that while the chancellor recognized that what he was engaged in conducting was a final hearing, the result of that hearing was determined by the insufficiency of the complainant's bill. The chancellor (at p. 97) having ruled that the complainant might amend his bill 'and make a case upon which the court could act,' there is no doubt about what under our present practice the course of procedure would have been. The summary hearing would have been continued until the bill had been amended and then the case, as presented by the amended bill, would have been summarily tried. The chancellor, however, decided that the 'case made out by the pleadings and proofs' did not warrant a decree or order granting the

²¹—*Stevenson, V. C.*, in *Pierce v. Old Dominion, etc., Smelting Co.*, 67 N. J. Eq. 399 (1904).

prayer of the bill. The complainant then proceeded to file an amended bill, and under the old practice of the court, without objection, depositions were taken and the cause was again brought to a final hearing. Thus a second final hearing was had of a cause which had already been finally heard. No objection seems to have been interposed at any time to this peculiar course of procedure."²²

"If upon the summary hearing (the witnesses on both sides, for instance, being sworn in open court, and the proceeding being indistinguishable from an ordinary final hearing) the decree goes that the corporation be enjoined from exercising its franchises, the proceedings as a suit *inter partes* is ended, and what follows is the administration of a trust under the direction of the court. This trust arises from the situation created by the injunction which disables the corporation from exercising its franchises and taking care of its property.

"After the summary final hearing no process of subpoena is issued or ought to be issued. The entire function of process has been performed by service of the statutory notice under the direction of the court. Whether the corporation has submitted an answer upon the summary hearing, or only offered affidavits, or has without answer or affidavits appeared and contested the complainant's case, or has made default, no other subsequent final hearing can be had. Long before any subsequent final hearing could be brought on, under the practice of the court, the entire assets of the insolvent corporation might be converted into cash and distributed, and under a comparatively recent statute the corporation itself might be dissolved by an order of the court made in the cause of proceeding. The opportunity for the defendant corporation to file an answer and to litigate the whole cause of action set forth in the bill or petition is on the return day of the order to show cause at the time appointed for the summary final hearing. Both parties on this hearing, under our settled practice, are allowed an ample opportunity to present proofs. No surprise is tolerated. The hearing, frequently, may be continued in order that the whole case may be fully and fairly tried. The limitations upon the use of affidavits, under our ancient practice, and particularly under rule 122, on the argument of motions for an injunction or motions to dissolve an injunction, are not applicable to this summary hearing under our statute. Before these summary hearings became to so large an extent practically confined to the vice-chancellors' courts, the chancellor frequently made an order for the taking of depositions before a master on notice, subject to the right of cross-examination, and adjourned the hearing until the depositions so taken could be presented. At present this course is sometimes taken in the vice-chancellors' courts, but frequently the whole cause is tried upon oral testimony, precisely like any other equity cause on final hearing. If, as the result of this summary final hearing, the complainant or petitioner

²²—Stevenson, V. C., in *Pierce v. Old Dominion, etc., Smelting Co.*, 67 N. J. Eq. 399 (1904).

fails to sustain his case, the action of the court is not a mere order denying a motion and vacating an order to show cause, leaving the suit still pending, but a final decree dismissing the petition or bill. After the defendant corporation has been brought into court by service of the statutory notice, has presented its answer or its answering affidavits, and both parties have had an ample opportunity to present their proofs, oral and written, and then the court has decided that the proofs fail to sustain the complainant's case—fail to show that the defendant is insolvent to the extent defined by the statute, and that therefore no injunction should be issued or receiver be appointed—the complaining creditor or stockholder cannot continue to prosecute his suit and bring on a further subsequent final hearing, upon which his cause will be tried over a second time and the defendant be subjected to a second defence.

“On the other hand, if upon this summary hearing the defendant, having a full opportunity to present its answer and proofs, has failed to meet the case of the complainant and has been disabled from exercising its franchise by an injunction and thereupon has lost title to all its assets by transfer thereof to a receiver, it cannot file an answer, if it has not already done so, and proceed through, perhaps, six months or a year to litigate the complainant's cause as a pending suit in the manner prescribed for all causes prosecuted under the general equity jurisdiction of the court. If such be the case it would be necessary to delay distribution of the assets until the end of the cause. It would seem also that a similar delay would have to be made in the entry of any order dissolving the corporation.

“Whatever may be the finding of the court upon the summary hearing, the matter which is then contested by the parties, the status of the corporation becomes *res adjudicata* by whatever decree or order the court may make. Both parties to the litigation have their day in court—their ample opportunity to present pleadings and proofs to sustain their respective contentions.

“If either is dissatisfied with the decision of the court the remedy is an appeal to the court of errors and appeals. The litigation in this court over the cause of action set forth in the petition or bill is ended.

“If the action of the court of chancery on this summary hearing is only an interlocutory order and not a final decree in the cause, disposing finally of the statutory cause of action set forth in the petition or bill, when, it may be asked, is such a final decree ever rendered under our present practice? If the corporation does not appear, or appears but files no answer, it is not the practice to take a decree *pro confesso* and then take proofs *ex parte* and bring on the cause for a final decree. If, however, a final decree is not reached upon the summary hearing such proceeding would seem to be proper and even necessary.

“Upon filing the bill or petition a preliminary order of injunction, restraining the defendant corporation from transferring its assets, is generally made. Originally a preliminary writ of injunction was is-

sued. Such preliminary restraint, however, does not disable the corporation permanently from exercising its franchises. The earlier cases, it is true, indicate that the practice was to issue a writ of injunction 'according to the prayer of the bill,' which would include restraint upon the exercise of the corporate franchises; but this preliminary injunction was limited in its operation in cases where an interruption of the business of the corporation pending the hearing on the return of the order to show cause might be injurious. It was only upon the summary hearing, after notice to the defendant corporation, that the 'full injunction,' i. e., the complete statutory injunction permanently disabling the corporation from exercising its franchises, was allowed to go. (*Parsons v. Mouroe Manufacturing Co.*, 4 N. J. Eq. 187, 192, 202 (1842); *Brundred v. Paterson Machine Co.*, 4 N. J. Eq. 294, 299, 309 [1843]).

"The power of the court of chancery under this statute, if such power exists, to strip a defendant corporation of the right to exercise its franchises, to condemn it and suspend its life, if not put it practically to death, before giving it a hearing, has never so far as I am aware, been exercised.

"Immediately upon filing the bill also a receiver of the corporate assets may be appointed in a proper case without notice to the defendant corporation, but unless the defendant corporation has appeared and the 'summary hearing' has thereupon been held and the statutory injunction has been ordered, such a receiver is a mere custodian, takes no title under the statute, is appointed under the general equity power of the court which always appertains to the court whether exercising its ancient jurisdiction or some special and novel jurisdiction conferred by statute. One reason why novel statutory equitable actions are created is because the court of chancery is equipped with these special instruments, such as injunctions and receiverships, for the preservation of property and the accomplishment of justice." ²³

"In the case of *Franklin Electric Light Co. v. Fort Wayne Electric Corporation*, 58 N. J. Eq. 543, the dictum of Mr. Justice Van Syckel is liable to be misunderstood. Chancellor McGill held in this court in that case that the decree for an injunction restraining the corporation from exercising its franchises was a final decree. This accords with the view expressed by Chancellor Williamson and with the uniform practice since his time in this court. The court of errors and appeals sustained the decision of the chancellor upon the merits of the case, but Mr. Justice Van Syckel expressed the opinion that a bill of review was not necessary in order to obtain a reconsideration in the court of chancery of the order appointing a receiver, and stated that 'the order entered was not a final decree but a mere interlocutory order in the progress of the case.' The order appointing a receiver is

²³—*Stevenson, V. C.*, in *Pierce v. Old Dominion, etc., Smelting Co.*, 67 N. J. Eq. 399 (1904).

not necessarily a part of the final decree. The final decree is the decree of an injunction, this most effective and fatal decree, which virtually destroys the corporation like a judgment of ouster in a quo warranto case and prevents the corporation from perpetrating fraud. The order appointing a receiver may be made in connection with and as a part of the final decree, or may be made at any time after the final decree, as the statute expressly provides. The order appointing a receiver may be embodied in the final decree or may constitute the subject-matter of a separate subsequent order. Considered by itself, the order appointing a receiver is properly to be classified among interlocutory orders. It has never been intimated, so far as I am aware, that the decree of the court of chancery, made upon the summary hearing prescribed by the statute, either dismissing the petitioner's petition or the complainant's bill, or ordering that the statutory injunction be issued disabling the corporation from the exercise of its franchises, is not a final decree."²⁴

If upon bill and answer the court is not satisfied of the insolvency of a corporation, an injunction allowed on the bill will be dissolved.²⁵

The stockholders of a corporation cannot intervene, in an insolvency suit against it, to interpose defences that the corporation itself cannot set up.²⁶

"It was asked, in argument, where was the necessity of the act providing that an injunction should be issued to restrain the company, its officers and agents, from paying out, selling, assigning, or transferring any of the estate, moneys, funds, etc., of the said company, if such transfers were void without the injunction. The answer, I think, is obvious. The injunction prohibits all payments and transfers. Without the injunction, they were all valid, except such as were fraudulent; and all were fraudulent which were made in contemplation of bankruptcy, and for the purpose not of paying their debts in the ordinary course of business, but to defeat the object of the act, and in view of insolvency, giving an undue preference to particular creditors. It is very plain to be seen that a bank may be in such a condition as to render it very proper for the court to interfere by an injunction under the act; and yet, without such interference, the directors might go on, bona fide, in the ordinary transaction of the business of the bank, and all transfers made under such circumstances would be good. Why? Because they were made not in contemplation of bankruptcy, but to prevent that very catastrophe. The payment or transfer of property in the usual course of trade, if made to sustain the bank, and continue its business, is a bona fide payment or transfer. If contemplating bankruptcy, and in view of that, and to secure some advantage on that ac-

24—Stevenson, V. C., in *Pierce v. Old Dominion, etc., Smelting Co.*, 67 N. J. Eq. 399 (1904).

25—*Goodheart v. Raritan Mining Co.*, 8 N. J. Eq. 73 (1849).

26—*Cumberland Lumber Co. v. Clinton Hill Lumber Co.*, 64 N. J. Eq. 521 (1903).

count, such payment or transfer is made, it is not bona fide, but defeats the object of the act, and on that account is unlawful." 27

"It is further insisted that this power of issuing an injunction cannot be exercised against a corporation, other than a bank, until the company has actually suspended business. The phraseology in many parts of this act is obscure, and there is something in the language used in the sixth section that might, at first view, lead to this impression. The language is, 'if upon such inquiry into the matters or cause of complaint, it shall be made to appear to the Chancellor that the said company has become insolvent, and shall not be about to resume its business in a short time thereafter, with safety to the public and advantage to the stockholders', then an injunction may issue. * * * This section was no doubt intended to mean nothing more, than that in cases where the company has suspended business, the Chancellor will inquire into the prospect of its resuming again with safety to the public, and was not intended to limit the powers of the court to the happening of such an event. In some cases the company will have stopped business, and in some not; if they have stopped, it will then, and very properly, enter into the consideration of the case as to what the prospect of its again resuming is." 28

Where a mortgage is made by an insolvent corporation, pending a suit by a creditor to wind it up as an insolvent corporation, and also in violation of an injunction issued by the court of chancery, the mortgage is a nullity, and a subsequent dismissal of the creditor's suit will not render the mortgage a valid instrument.²⁹

No statutory receiver can be appointed unless the statutory injunction, which is the object of the suit, is also ordered or has been already ordered. A mere restraining order or a preliminary writ of injunction, "limited" in its operation, is not a sufficient basis for the making of an order appointing the statutory receiver.³⁰

It does not follow that because an injunction is granted, receivers should be appointed. In *Oakley v. The Paterson Bank*, 2 N. J. Eq. 173 (1839), Chancellor Pennington said:

"I am now moved, under the eighth section of the aforesaid act, to appoint receivers to take charge of the effects, and wind up the concerns of the bank. This I am authorized to do, 'if the circumstances of the case and the ends of justice require it.' This authority is a delicate one to be exercised. * * * The effect of appointing receivers is to take the property out of the hands and control of those persons to whom the stockholders * * * have confided it. After the best reflection in my power to bestow on the subject, I have come to the conclusion that receivers ought not to be appointed. It by no means

27—*Receivers of Peoples Bank v. Paterson Savings Bank*, 10 N. J. Eq. 13 (1854).

28—*Parsons v. Monroe Manufacturing Co.*, 4 N. J. Eq. 187 (1842).

29—*Bissell v. Besson*, 47 N. J. Eq. 580 (Court of Errors & Appeals, 1890).

30—*Pierce v. Old Dominion, etc., Smelting Co.*, 67 N. J. Eq. 399 (1904).

follows that because an injunction is granted, receivers should be appointed. They are independent questions.”³¹

A receiver should not be appointed if it appears that the directors are closing its affairs, and that such directors are in all respects trustworthy.³²

But as a general rule, where a corporation is declared insolvent under the act, receivers will be appointed. The court will not leave the management of the affairs of the corporation in the hands of the directors, unless it is shown to be for the interest of the creditors and stockholders that this should be done.³³

“The man who is appointed receiver upon the return day of the order to show cause or upon the appearance of the corporation upon the filing of the bill, is the statutory receiver. He is appointed after the summary final hearing prescribed by the statute has been held, and this summary final hearing, under our practice and under a general principle of law and justice, can only be held after the corporation has been brought into court by notice, or has voluntarily appeared. The receiver so appointed takes title to the assets, and the further proceeding on notice to all stockholders and creditors effects, or may effect, merely a substitution of another person as receiver. There is no distinction between the titles of these two receivers, and the use of the term ‘temporary receiver’ as applied to the first appointee, is liable to mislead. The term ‘temporary receiver,’ perhaps, might better be confined to the mere custodian receiver who is often appointed upon the filing of the bill under the general equity power of the court, in order to preserve the assets from waste until the hearing can be had which will determine whether the corporation is to be disabled or not and its assets vested in a receiver.”³⁴

The whole proceeding may end in placing the corporation under disabilities by the injunction; enjoining it from exercising its franchises; or the proceeding may go a step farther and there may be an order dissolving the corporation, and there may never be a receivership.³⁵

The United States circuit court in New Jersey had, in a suit by a foreign creditor of a New Jersey corporation, appointed a receiver, who had taken charge of all the assets of the corporation that were capable of being seized and had undertaken the collection of amounts due from stockholders on account of unpaid subscriptions, and in such suit the

31—See also *Rawnsley v. Trenton Mutual Life Ins. Co.*, 9 N. J. Eq. 457 (1853); *Nichols v. Perry Patent Arm Co.*, 11 N. J. Eq. 126 (1856); *Gallagher v. Asphalt Co. of America*, 67 N. J. Eq. 441 (1904).

32—*City Pottery Co. v. Yates*, 37 N. J. Eq. 543 (Court of Errors & Appeals, 1883).

33—*Nichols v. Perry Patent Arm Co.*, 11 N. J. Eq. 126 (1856). See also *Fitzgerald v. State Mutual B. & L. Ass'n*, 74 N. J. Eq. 440 (Court of Errors & Appeals, 1908).

34—*Stevenson, V. C.*, in *Gallagher v. Asphalt Co. of America*, 67 N. J. Eq. 441 (1904).

35—*Gallagher v. Asphalt Co. of America*, 67 N. J. Eq. 441 (1904).

federal court had also issued an injunction against the insolvent corporation in the terms prescribed by the New Jersey statute. The equitable action under the statute was then commenced in the court of chancery of New Jersey and a final decree was made therein that an injunction issue disabling the corporation from exercising its franchises, but the application for a receiver upon the final decree was denied. (65 N. J. Eq. 258). The motion for a receiver being renewed, and it not appearing that there were assets beyond the scope of the federal receivership, it was held that the motion should be denied.³⁶

In a case where the chancellor declined to appoint a receiver, he said: "The management being left in the hands of the directors, they will hereafter act under the immediate control and direction of the court. They will be enjoined from exercising any of the franchises of the company, except so far as may be necessary, in the most expeditious and economical manner, to collect its dues and pay its debts. They will be required from time to time to make such report as will keep the Chancellor advised of the condition of the company, and accomplish the ends contemplated by the act of the legislature."³⁷

98. ELIGIBILITY, SELECTION AND QUALIFICATION OF RECEIVER.

The statute is silent as to the facts to be considered by the court in the selection and eligibility of the person to be appointed receiver. These matters rest, therefore, in the discretion of the chancellor. Where the parties to the proceeding agree, the court will usually appoint their nominee.

Ordinarily an officer of a corporation, under whose management it has become insolvent, is not a proper person to be appointed its receiver. "The reason of the rule is obvious: A person who cannot, with the aid of others, manage a business successfully, is, as a general rule, unfit to wind it up alone."¹

Every receiver shall before acting enter into such bond and comply with such terms as the court may prescribe, and take and subscribe the following oath or affirmation: "I,....., do swear (or affirm) that I will faithfully, honestly and impartially execute the powers and trusts reposed in me as receiver, for the creditors and stockholders of the, and that without favor or affection," which oath or affirmation shall be filed in the office of the clerk in chancery within ten days after the taking thereof.²

A surety of a receiver in chancery is held to be concluded, in an action at law on the bond, by the amount found due on an account

36—Gallagher v. Asphalt Co. of America, 67 N. J. Eq. 441 (1904).

37—Rawnsley v. Trenton Mutual Life Ins. Co., 9 N. J. Eq. 347 (1853).

1—McCullough v. Merchants' Loan & Trust Co., 29 N. J. Eq. 217 (1878); see also Freeholders of Middlesex County v. State Bank of New Brunswick, 28 N. J. Eq. 166 (1877).

2—Corporation Act, § 67.

taken in chancery, he having, by due notice, had an opportunity to intervene in the taking of such account.³

99. EFFECT OF THE APPOINTMENT OF RECEIVER AS TO THE PROPERTY AND STATUS OF THE CORPORATION.

In *Gallagher v. Asphalt Co.*, 65 N. J. Eq. 258, Vice-Chancellor Stevenson said: "I think it is safe to say that in New Jersey, apart from the direct effect of statutes, an insolvent corporation has the same dominion over its assets and its creditors have the same power to reach those assets for the payment of their claims, that we find exhibited in the case of an insolvent natural person. The modifications and limitations of this dominion of the corporation over its property, and this power of the creditors to reach that property preferentially, are derived from our statutes, and not from any theory that immediately upon the insolvency of a corporation anything that can properly be described as a trust, is created in respect of the corporate assets. Of course, when by reason of the insolvency or of the dissolution of a corporation, or from any other cause, the assets of the corporation are placed in the possession of a receiver or have become vested in him by law, a trust of a high character is at once created. But neither the insolvency or other condition of the company, nor the commencement of a suit to establish a receivership, and the trust connected therewith, has the effect to establish such trust."

The general corporation act (§ 68) provides that all the real and personal property of an insolvent corporation, wheresoever situated, and all its franchises, rights privileges and effects, shall, upon the appointment of a receiver, forthwith vest in him, and the corporation shall be divested of the title thereto.

In *Squire v. Princeton Lighting Co.*,¹ Mr. Justice (now Chancellor) Pitney gives the following history of section 68:

"Section 68 of the Corporation Act of 1896, which provides that upon appointment of a receiver the property of the insolvent corporation forthwith vests in him, is a new section intended to set at rest the question whether the property of an insolvent company vests at all in the receiver. Upon the law as it formerly stood, this question had been in doubt. In *Willink v. Morris Canal & Banking Co.*, 4 N. J. Eq. 377 (1843), the Chancellor held that 'Under the Act to prevent frauds by incorporated companies, the property of the company did not vest in the receivers; that they were merely substituted in the place of directors and managers for the purpose of settling up and closing the affairs of the company; that the title to the property was not changed, but a power only delegated to the receivers to take charge of it and sell it.' Six years later another Chancellor, apparently in ignorance of the previous decision, held that the statute and the appointment of receivers under it was a conveyance or transfer of all the property of

3—*Ball v. Chancellor*, 47 N. J. L. 125 (Court of Errors & Appeals, 1885).

1—72 N. J. Eq. 883 (Court of Errors & Appeals, 1907).

the insolvent corporation to the receivers. (*Corrigan v. Trenton, Delaware Falls Co.*, 7 N. J. Eq. 489 [1849]). In *Freeholders of Middlesex v. State Bank*, 29 N. J. Eq. 268 (1878), Vice-Chancellor Van Fleet held that the appointment of a receiver under the Corporation Act of 1875, invested him with full power to sell, assign and convey all the property of the corporation. (Rev. 1877, p. 189, § 72.) 'No act by the corporation' he said, 'is necessary to complete either the title of the receiver or that of his purchaser. Unlike proceedings under bankrupt laws, no assignment by the debtor or commissioner is required. Title is divested by force of law, and such divestiture is perfect and absolute.'

"The same view is entertained by Chancellor Runyon in *Minchin v. Second National Bank*, 36 N. J. Eq. 436, who cited *Corrigan v. Trenton Delaware Falls Co.*, *supra*, and *Freeholders of Middlesex v. State Bank*, *supra*. But in *Receiver of State Bank v. First National Bank*, 34 N. J. Eq. 450, Vice-Chancellor Van Fleet held that the receiver had a mere right of possession and power to sell; that the law took custody of the property, leaving the title unchanged until sale made. And in *Kirkpatrick v. Corning*, 37 N. J. Eq. 54, Chancellor Runyon himself adopted the view last mentioned, at the same time pointing out that while Vice-Chancellor Van Fleet's judgment in *Freeholders of Middlesex v. State Bank* was affirmed by the Court of Errors and Appeals in 30 N. J. Eq. 311, the view expressed by the Vice-Chancellor upon the present topic, was unnecessary to his decision, and there was no opinion in the court of last resort. See also cases cited in *Crews v. United States Car Co.*, 57 N. J. Eq. 357. Section 68 of the Act of 1896 settles this long disputed question as to whether the receiver took title or only custody of the property of the insolvent corporation. The present question is, when does the title of the insolvent corporation cease? We answer, not before there is either an adjudication of insolvency or the appointment of a receiver or trustee."

In *Squire v. Princeton Light Co.*,² the Court of Chancery made an order restraining the corporation from paying or transferring its money and effects or contracting any debts, and from selling, assigning or transferring its property, and also requiring it to show cause on a later day why an injunction should not issue and a receiver be appointed. Thereafter, and before the hearing of the order to show cause, a common law judgment was recovered against the corporation upon which execution was issued to the sheriff who made a levy upon the personal property of the corporation sufficient to satisfy the judgment. Upon the hearing of the order to show cause, a receiver was appointed who took possession of the personal property upon which levy had been made, and used it for the benefit of the estate of the corporation. It was held that the judgment creditor was entitled to priority in payment.

In *Gallagher v. True American Pub. Co.*, 71 Atl. 741 (1909), it was held that the law will take account of the fraction of a day when justice so requires, and that, if, on a day when the court of chancery adjudi-

2—72 N. J. Eq. 883 (Court of Errors & Appeals, 1907).

cates that a corporation is insolvent and appoints a receiver thereof in whom title to the company's real and personal property thereupon vests, a judgment is recovered and entered against the corporation at an earlier hour, the judgment is to be paid out of the proceeds of the sale of the company's land as a preferred claim, because the judgment was a lien upon the land at the time of the appointment of a receiver. The opinion contains a valuable discussion of the subject.

In the case of personal property, however, an actual levy must be made. Thus, where a constable, having in his hands an execution, issued by a justice of the peace, against the goods and chattels of an insolvent corporation, before decree of insolvency actually made, went to the factory of the defendant company and attempted to levy upon the goods of the defendant, which were locked up within the warehouse, and, without effecting an entrance, made an incomplete inventory of them by a partial view through a small opening in a window, it was held, that the attempt to make a levy was a failure, and created no lien upon the goods as against the receiver.³

As between an assignee of a fund under an equitable assignment, and the receiver of the assignor, an insolvent corporation, notice of the assignment to the debtor or holder of the fund is not necessary to perfect the title of the assignee.⁴

Pending the injunction and receiver, and before the making of a decree of dissolution, the corporation has power to take steps looking towards a reorganization and resumption of its property and business. In exercising such powers the corporation may employ agents and incur a liability to compensate them for their services. Whether the compensation of such agents is a liability which can be charged upon the assets of the insolvent corporation in case it fails to resume its property and business has not been decided; but for such compensation the corporation will be liable if the injunction is dissolved and the receiver removed.⁵

In *Linn v. Dixon Crucible Co.*, *supra*, the court said that "by the supplement to the Corporation Act, which was approved March 8th, 1877, the eighty-third section [now section 55 of the Corporation Act of 1896] above considered was amended by striking out its last clause, which provided for the forfeiture of certain corporate powers after the period of four months, and substituting in its place a provision that, for all other purposes—that is, other than those set forth in the preceding exception—the Chancellor might at any time declare the charter to be forfeited and void. As thus amended, the plain intent of this legislation is to continue the corporate powers of a corporation declared insolvent unimpaired, except as their exercise may be impliedly curtailed by the powers conferred on the receiver, for the period of four

3—*Nelson v. Van Gazelle Valve Manufacturing Co.*, 45 N. J. Eq. 594 (1889).

4—*Cogan v. Conover Mfg. Co.*, 69 N. J. Eq. 809 (Court of Errors & Appeals, 1906).

5—*Linn v. Dixon Crucible Co.*, 59 N. J. L. 28 (1896).

months, and thereafter corporate powers were to continue, but only for the purpose of settling its affairs." In the Revision of 1896 the four months limitation was stricken out, so that the corporate existence continues until the decree of dissolution is made.

The Court of Chancery will, in a proper case, order an election of directors to be held by the stockholders of an insolvent corporation for which a receiver has been appointed under the statute.

"Under the circumstances, this court has power over the subject, and it is its duty not only to see to it that an election be held, but that it be so held and conducted as that it shall in all respects be legal. The action of stockholders before referred to in taking steps for an election under the fifty-first section of the act concerning corporations was objectionable, because it was taken without application to this court, which alone, under the circumstances, could take the measures necessary to secure fairness in the election and obviate all reasonable cause of complaint on the ground of surprise. * * * I deem it proper to conform to the by-laws as nearly as practicable in holding the election. There will be an order that the directors hold it, fixing as early a date as practicable; the day to be named in the order. The election will be held and conducted in accordance with the provisions of the by-laws, as nearly as may be. The board will appoint the inspectors; the names of the persons appointed to be reported to this court at least ten days before the time fixed for the election. The transfer book will be closed twenty days before the time fixed for the election. The receiver will be directed to facilitate the proceedings by permitting the use of the books, etc., and in every other way."⁶

The statutory power of the receiver to sue on contracts includes by reasonable implication, the power of doing whatever the corporation or its directors were required to do as a preliminary to suit. The receiver, therefore, may levy an assessment and issue a call in respect to unpaid subscriptions for stock.⁷

The express contracts of the subscriber, to pay in such proportions and at such times as the directors might, agreeably to the charter, require, includes a promise, implied by operation of law, to pay in such proportions, etc., as the receiver, on the insolvency of the company, might, agreeably to the charter, require. An assessment made by the receiver binds the promisor as he would have been bound if the directors had made it.⁸

6—*Lehigh Coal & Navigation Co. v. Central R. R. Co. of N. J.*, 35 N. J. Eq. 349 (1882).

7—*Grosse Isle Hotel Co. v. I'Anson*, 42 N. J. L. 10 (1880); 43 N. J. L. 442 (Court of Errors & Appeals); *Scovill v. Thayer*, 105 U. S. 143.

8—*Meley v. Whitaker, Receiver*, 61 N. J. L. 602 (Court of Errors & Appeals, 1898); see also *Hawkins v. Glenn*, 131 U. S. 319, 329; *Falk v. Whitman Cigar Co.*, 55 N. J. Eq. 396 (1897).

100. STATUS, POWERS AND DUTIES OF RECEIVER.

The receivers derive their power wholly from the statute under which they are appointed and have no authority which is not conferred by it. But this power need not be expressly conferred; if it can be fairly implied from the general scope of the statute, or as incidental to a power expressly given, it is sufficient.¹

The Corporation Act provides (§ 73) that every matter and thing by this act required to be done by receivers or trustees shall be good and effectual, to all intents and purposes, if performed by a majority of them.

The Corporation Act provides (§ 66) that the receiver may be appointed with full power and authority to demand, sue for, collect, receive and take into their possession all the goods and chattels, rights and credits, moneys and effects, lands and tenements, books, papers, choses in action, bills, notes and property of every description of the corporation, and to institute suits at law or in equity for the recovery of any estate, property, damages or demands existing in favor of the corporation, and in his or their discretion to compound and settle with any debtor or creditors of the corporation, or with persons having possession of its property or in any way responsible at law or in equity to the corporation at the time of its insolvency or suspension of business, or afterwards, upon such terms and in such manner as he or they shall deem just and beneficial to the corporation, and in case of mutual dealings between the corporation and any person to allow just set-offs in favor of such person in all cases in which the same ought to be allowed according to law and equity; a debtor who shall have in good faith paid his debt to the corporation without notice of its insolvency or suspension of business, shall not be liable therefor, and the receiver or receivers or trustees shall have power to sell, convey and assign all the said estate, rights and interests, and shall hold and dispose of the proceeds thereof under the directions of the court of chancery; the word receiver as used in this act shall be construed to include receivers and trustees appointed as provided in this act.

In general, the powers of the court of chancery are such as suffice to enable the assets and property of the corporation to be turned into money and distributed among the creditors. "These powers are to be exercised by a receiver, under the control of the court. Without other express authority, it is plain that for the proper performance of the duties thus imposed on the court, and to be performed by its officer, the latter must take charge of all the property of the corporation, and so manage and preserve it as to enable it to be disposed of most advantageously. With respect to the property of ordinary corporations, this duty can be fully performed by merely storing, insuring and otherwise guarding the property and preserving its value until a sale can be

1—Runyon v. Farmers' & Mechanics' Bank, 4 N. J. Eq. 480 (1845). See also Lockport Felt Co. v. United Box Board & Paper Co., 74 N. J. Eq. 686 (1908).

judiciously made. Ordinarily, as was well observed by the Vice-Chancellor, there is no necessity or propriety in continuing the business of such corporations, and an early conversion of their assets into money, and its distribution among the creditors is the plan of wisdom. But if the business of an insolvent railroad be arrested and its operation stopped, it is clear that its property would not be preserved in a condition likely to realize its full value. On the contrary, a cessation of its business would be fatal to the interests of all concerned. In the absence of any express enactment, it seems to me the legislation which gives authority to deal with and convert into money and property, must be held to give, by implication, all needful authority to so run the road as to preserve its traffic and connections. The duty imposed requires the road to be so managed that, when ready to be disposed of, the lessee or purchaser will acquire, not merely the road-bed, rails, locomotives and cars, but a going concern actually engaged in business." 2

Unlike the case of a public service corporation, the receiver of a strictly private corporation may be authorized to borrow money on receiver's certificates, which shall be a lien prior to that of a subsisting encumbrance, only for one purpose—the preservation of the property and the expenses of realizing on it by a sale, except, possibly, the continuance of insolvent's business, as an absolute essential to such preservation.^{2a}

An application to a court of equity for payment of debts incurred by a receiver in the custody and management of the property is proper, and where the debts have been incurred without the express order of the court, the claims will be adjusted on an equitable basis.³

An application by receivers of an insolvent railroad for authority to issue certificates of indebtedness to cover certain expenses, and an order of the court thereon accordingly, does not bind the receivers or the trust fund to pay particular items of such expenses, the propriety of whose payment was not before the court.⁴

In the disposition of the trust property in their hands, receivers have a discretion, for the due exercise of which they are responsible to the court, and in the exercise of which they are subject to its control. Receivers are not, like executive officers, bound to sell for the highest price, without regard to the purchaser, or to the disposition he may make of the property.⁵

A sale fairly made, will not be disapproved merely because of an in-

2—*Vanderbilt v. Central R. R. Co.*, 43 N. J. Eq. 669 (Court of Errors & Appeals, 1887).

2a—*Lockport Felt Co. v. United Box Board & Paper Co.*, 74 N. J. Eq. 686 (1908). See also *Porch v. Agnew*, 70 N. J. Eq. 328 (1905).

3—*Vanderbilt v. Central R. R. Co.*, 43 N. J. Eq. 679 (Court of Errors & Appeals, 1887); *Nessler v. Industrial Land Development Co.*, 65 N. J. Eq. 491 (1903).

4—*Coe v. N. J. Midland Ry. Co.*, 27 N. J. Eq. 37 (1876).

5—*Knott v. Receivers of Morris Canal*, 4 N. J. Eq. 423 (1844).

creased bid. The settled policy of the law has been to encourage bidding and purchases at public sale and that purchasers making bona fide bids are to be protected in the advantages of a fair purchase. The general rule is that where the sale is made for a fair price and in good faith, and there is no irregularity, fraud, mistake or legal surprise, with which the purchaser is or ought to be chargeable, the subsequent offer by another bidder of a higher price is not of itself sufficient reason for refusing confirmation of a sale or of reopening the confirmation. "Nearly all public and private sales by officers of the court now require confirmation, and to allow such sales to be opened by the mere increase of the bid at the time fixed for confirmation, would practically result in the subversion of the entire system of sale by officers, either public or private, and would make their first contract of sale merely the starting point for bids on the property, instead of a bona fide, genuine sale."⁶

Thus, where a hotel corporation in the hands of a receiver, was hopelessly insolvent, and at the time of a receiver's sale of its assets it did not appear that there was any capital present or obtainable by further contributions to enable a resumption of its business, it was held that it was not an abuse of the receiver's discretion to refuse to adjourn the sale at the request of counsel representing 97% of the creditors, and all the stockholders, on the ground that an agreement had been made by a large part of the creditors for an extension of time, and that the sale would be confirmed.⁷

The act further provides (§ 71) that such receiver shall have power to send for persons and papers and to examine any persons, including the creditors and claimants, and the president, directors and other officers and agents of the corporation, on oath or affirmation (which oath or affirmation the receiver may administer), respecting its affairs and transactions and its estate, money, goods, chattels, credits, notes, bills and choses in action, real and personal estate and effects of every kind, and also respecting its debts, obligations, contracts and liabilities, and the claims against it; and if any person shall refuse to be sworn or affirmed, or to make answers to such questions as shall be put to him, or refuse to declare the whole truth touching the subject matter of the said examination, the court of chancery may, on report by the receiver, commit such person to prison, there to remain until he shall submit himself to be examined, and pay all the costs of the proceedings against him.

Where service of a summons is made by a receiver on a person without the state, the courts of the state have no authority to make an order adjudging such person in contempt for failing to appear.⁸

6—*Rogers v. Rogers' Locomotive Co.*, 62 N. J. Eq. 111 (1901); *Morrisse v. Inglis*, 46 N. J. Eq. 306 (Court of Errors & Appeals, 1889); *Bethlehem Iron Co. v. Philadelphia & Seashore R. R. Co.*, 49 N. J. Eq. 356 (1892); *Bliss v. New York Life Insurance Co.*, 51 N. J. Eq. 630 (Court of Errors & Appeals, 1893).

7—*Fleming v. Fleming Hotel Co.*, 70 N. J. Eq. 509 (1905).

8—*Fidelity & Casualty Co. v. MacAfee*, 72 N. J. Eq. 279 (1907).

Under this act, the receivers have due authority to compel any person to disclose any knowledge he may possess, respecting the affairs and transactions of the company; and the complainant, and it would seem also any creditor or stockholder on proper application to the receivers, may have such disclosure. The receivers represent as well the creditors as the stockholders of the company.⁹

Such receiver, with the assistance of a peace officer, may break open; in the daytime, the houses, shops, warehouses, doors, trunks, chests or other places of the corporation where any of its goods, chattels, choses in action, notes, bills, moneys, books, papers or other writings or effects have been usually kept, or shall be, and take possession of the same, and of the lands and tenements belonging to the corporation.¹⁰

Whenever a receiver of a corporation shall have charge of a canal, railroad, turnpike or other work of a public nature, in which the value of the work is dependent upon the franchise, and in the continuance of which the public as well as the stockholders and creditors have an interest, the receiver may sell or lease the principal work for the construction whereof the said corporation was organized, together with all the chartered rights, privileges and franchises belonging to it and appertaining to such principal work; and the purchaser or purchasers, lessee or lessees of such principal work, chartered rights, privileges and franchises, shall thereafter hold, use and enjoy the same during the whole of the residue of the term limited in the charter of said corporation, or during the term in such lease specified, in as full and ample a manner as such corporations could or might have used and enjoyed the same; subject, however, to all the restrictions, limitations and conditions contained in such charter; provided, that nothing in this section contained shall be so construed as to apply to or in anywise affect any corporation authorized by law to exercise banking privileges.¹¹

A receiver may sue for the benefit of creditors against directors for mismanagement, producing insolvency, consisting in diverting all the assets of the company to the directors themselves or to a company of which they are the sole stockholders: "For such a breach of trust, the receiver may, I think, sue for the benefit of creditors. Besides, the argument rests upon the assumption that the right of the receiver is identical with that of the creditor. This is not the case. The receiver is, it is true, the representative of creditors, but he is also the representative of the corporation and of its stockholders. If either the corporation or its stockholders may inquire into the acts charged in this appeal, the receiver may."¹²

The receiver of an insolvent corporation holds its property and franchises for the benefit of the creditors, and if the surplus, after

9—*Smith v. Trenton Delaware Falls Co.*, 43 N. J. Eq. 505 (1845).

10—*Corporation Act*, § 72.

11—*Corporation Act*, § 82.

12—*Hayes v. Pierson*, 65 N. J. Eq. 353 (Court of Errors & Appeals, 1899).

satisfying the creditors of the expenses of the receivership remains, then for the benefit of the stockholders. He may, therefore, seek to find out who are the stockholders to whom he may eventually be liable. It is not necessary that his bill seeking to have determined who the stockholders are, should disclose whether the assets he has reached or may reach, are sufficient or insufficient to satisfy the creditors; nor can it be considered upon a demurrer to the bill, whether by the proceedings in the original cause, it has been made to appear that there are no assets sufficient to satisfy creditors.¹³

The receiver may, by suit or defense, avoid any instrument which is void as against creditors. Thus, to successfully contest the validity of a chattel mortgage he is not required to show that it is fraudulent as to creditors, but all he need do is to show such facts as under the statute render it void as against the creditors of the corporation.¹⁴

The debtor of an insolvent corporation has the same equitable right of set-off against a claim of the receivers, that he had against the corporation at the time of its insolvency. The claim of the debtor against the insolvent corporation does not constitute a legal set-off under the general statute of set-off, as against the receivers. But in an action at law by the receivers, the defendant will be permitted, under the provisions of the statute to avail himself of the defence.

Chief Justice Green said "An act to prevent frauds by incorporated companies, so far as it relates to the estate of an insolvent corporation, is, in all its essential elements, a bankrupt law. It leaves the creditor, indeed, the naked remedy of proceeding to judgment against a corporation, stripped at once of its property, and the right of exercising its franchises; and thus avoids the constitutional objection of interfering with the obligation of contracts. But, like a bankrupt law, it vests the whole property of the corporation, by operation of law, in the hands of assignees, to be distributed among the creditors upon principles of justice and equity. The assignment to the receivers, being by operation of law, passes the rights and property of the corporation precisely in the same plight and condition, and subject to the same equities, as the corporation held them. The receivers are not assignees for a valuable consideration, in the ordinary sense of that term, but are regarded as the voluntary assignees and personal representatives of the corporation. The statute, moreover, in cases of mutual dealing between the corporation and any other person or persons, expressly authorizes the receivers to allow just set-offs in favor of such persons, in all cases in which it shall appear to the receivers that the same ought to be allowed according to law and equity. * * * I am of opinion, both upon principle and upon authority, that the debtor of an insolvent corporation loses none of his rights by the act of insolvency; that he has the same equitable right of set-off against the receivers that he had against the corporation at

13—*McMaster v. Drew*, 70 N. J. Eq. 6 (1906).

14—*Graham Button Co. v. Spielman*, 50 N. J. Eq. 120 (1892).

the time of its insolvency. * * * The only remaining inquiry is, whether this [the Supreme] court can administer the remedy to which the defendants are equitably entitled. This is but a subordinate question, touching not the right, but the mode of enforcing it; and it is of the less consequence, because if the equitable right of the party be established, it is obvious that he may always resort to equity, and obtain redress there, if it be denied at law. The act to prevent frauds by incorporated companies is a remedial statute, designed for the suppression of fraud and the advancement of justice. The twelfth section is not merely directory, nor does it leave it to the discretion of the receivers whether set-offs shall be allowed or not. It was designed to prescribe a rule for their action, and to define and settle the rights of parties as well as to confer powers. In its operation, it entitled the party, as a matter of *legal right*, to the benefit of every set-off, legal and equitable. It is the policy of the act, that parties should have the benefit of its provisions, in whatever tribunal their rights may be drawn in question.”¹⁵

“The words of the act under which these proceedings are had, in relation to this species of set-off, are peculiar and liberal. In case of mutual dealings between the said corporation and any other person or persons, the receivers are to allow just set-offs in favor of such person or persons, in all cases in which it shall appear to them that the same ought to be allowed according to law and equity.” The act does not confine itself to legal set-offs. It refers to just set-offs; and expressly directs the receivers to allow them when they ought to be allowed according to *law* not only, but equity also. From the phraseology of the statute the legislature had something more in view than the general provisions of the law in regard to set-offs. It gives to the receivers an equitable power, and they are to exercise it according to the justice of the case.¹⁶

The principle is that where there is a statute prohibiting preferences or assignments after insolvency, the date of insolvency fixes the time, and claims purchased thereafter cannot be set off, regardless of the date when a receiver is appointed.¹⁷

It has been held that in a suit by the receiver of an insolvent corporation against a stockholder to compel him to pay unpaid subscription to the stock, the defendant cannot set off a debt due him from the corporation. The chancellor said: “The debts are not substantially the same. They are not in the same right. The capital stock of the bank is a trust fund for the security and payment of the creditors, and it is the duty and legal obligation of the stockholders to pay it in according to their agreement, in order that it may be applied to the payment of

15—*Receivers v. The Paterson Gas Light Co.*, 23 N. J. L. 283 (1852).

16—*State Bank v. Receivers of Bank of New Brunswick*, 3 N. J. Eq. 266 (1835).

17—*Miller v. Audenried*, 67 N. J. Eq. 252 (1904); affirmed 68 N. J. Eq. 658 (Court of Errors & Appeals, 1905).

the debts. A stockholder is not relieved from that duty and obligation by the fact that he is a creditor. To permit him to set off the debt due him would, where the corporation is insolvent, manifestly give him a preference as a creditor. To this he is not entitled. It is the right of the other creditors to have him pay in the money due from him for stock as part of the fund for the payment of the debts. The principle has frequently been enunciated and is established."¹⁸

In an action by a receiver on a promissory note made to his predecessor it is no defense that the loan of trust funds by the original receiver was without legal authority.¹⁹

"The great duty of the receivers is, faithfully to collect and justly to disburse the assets, constituting the trust fund. In doing this, they are properly invested with a discretionary power to compound and settle; but in the exercise of such power, they must keep primarily and constantly in view, the interests of those for whom they act."²⁰

The statute provides (Corporation Act, § 74) that such receiver, as soon as convenient, shall lay before the court of chancery a full and complete inventory of all the estate, property and effects of the corporation, its nature and probable value, and an account of all debts due from and to it, as nearly as the same can be ascertained.

The statute (Corporation Act, § 74) requires the receiver to make a report to the court of his proceedings every six months during the continuance of the trust.

101. CONTROL OF RECEIVER AND TRUST ESTATE BY COURT OF CHANCERY.

The act provides (§ 73) that the court of chancery may remove any receiver or trustee, and appoint another or others in his place or fill any vacancy which may occur.

When a corporation becomes insolvent, the court, by authority of law, takes possession of its assets for the benefit of creditors and stockholders, and, through the instrumentality of an officer of its own creation, converts them into money and distributes them. The court confers his functions, and may put an end to them whenever it deems it expedient to do so, but like all other judicial action resting in discretion, its exercise should always be grounded in some consideration of justice or convenience. "It should never be exercised capriciously nor arbitrarily, but only for cause. It might be difficult, if not impossible, to say what will be esteemed sufficient cause in every imaginable case, but it may be said generally, if the receiver was an officer of the corporation at the time it became insolvent, and it appears proper that his conduct, as such officer, should be investigated, to see whether

18—Williams v. Traphagen, 38 N. J. Eq. 57 (1884).

19—Corbin v. De La Vergne, 44 N. J. L. 70 (1882).

20—Suydam v. Receivers of Bank of New Brunswick, 3 N. J. Eq. 114 (1834).

he has not obtained a benefit or advantage which in equity he ought not to be permitted to retain, sufficient cause for his removal exists." ¹

In a recent case, it was held that a receiver of a corporation appointed at the suit of the holders of a small proportion of the stock will be discharged where it appears that the corporation is not insolvent, the fraudulent procurement of proxies, by which it is alleged the individual defendants obtained control, is denied, and there is little evidence of it, and that an arrangement has been made by which the time of maturity of obligations of the corporation shall be extended till after a change in control of the corporation may be made, if the stockholders so desire, and that the collateral given to secure such obligations is protected from being sacrificed.²

After a receiver had been appointed, the defendant company filed a petition setting up new facts and praying that the appointment of a receiver be vacated. It was held that it was not necessary to file a bill in the nature of a bill of review to obtain the relief asked for in the petition.³

Where an order of distribution is made based upon incorrect principle, the court may correct such order and direct distribution in accordance with the rules of distribution prescribed by law. The Court of Chancery has power to correct pendente lite an obvious fallacy in one of its own orders.⁴

In the case of a domestic corporation, the court of chancery has the exclusive right to administer and dispose of the assets which the receiver holds in this state. The receiver has no power to transfer to a foreign jurisdiction any question touching the appropriation and distribution of such assets. "He could not thus deprive the court which appointed him of its authority over him and over the fund which he held as its officer." ⁵

Where two railroads were in the hands of receivers, appointed by the court of chancery, under insolvency proceedings, it was held, that the court had power, on the application of either receiver, to modify a contract made before their insolvency, so as to equitably re-adjust the rates agreed upon by them for terminal facilities, and, also, for the use of part of one road by the other company. The Court said: "The Court, of course, will not take the property of one railroad company for the benefit of another. It will not require the receiver of one railroad company to furnish facilities to the receiver of another in the operation of the road in charge of the latter, to the detriment of the trust in the hands of the former; but, if there be necessity for so

1—McCullough v. Merchants' Loan & Trust Co., 29 N. J. Eq. 217 (1878).

2—Stokes v. Knickerbocker Investment Co., 70 N. J. Eq. 518 (1905).

3—Ft. Wayne Electric Corporation v. Franklin Electric Light Co., 53 N. J. Eq. 543 (Court of Errors & Appeals, 1899).

4—Lyle v. Staten Island Terra Cotta Lumber Co., 62 N. J. Eq. 797 (Court of Errors & Appeals, 1901).

5—Reynolds v. Stockton, 43 N. J. Eq. 211 (Court of Errors & Appeals, 1887).

doing, it will not hesitate to modify the terms on which the facilities are furnished, wholly ignoring, if need be, the bargain made between the two insolvent companies, always taking care, however, that the company furnishing the facilities receives due compensation therefor.”⁶

The receiver of a railroad corporation has no power, without the authority of the chancellor, to make a contract which will bind the trust. All contracts made by the receiver of a railroad corporation are subject to the control of the chancellor, and he may modify them, or disregard them entirely, as to him may seem best. “When a railroad corporation passes into the custody of the law, for the purpose of having its road operated and its property administered by the chancellor, for the benefit of the public and for the protection of its creditors and stockholders, neither its franchises nor its property can be legally charged with any burden or obligation without the order of the chancellor. The chancellor is in possession of this railroad. The receiver is the chancellor’s officer; he acts simply in a fiduciary capacity, and is at all times subject to the orders of the chancellor. The statute regulating the operation of railroads while in the custody of the law, declares that the receiver shall operate the road for the use of the public, subject at all times to the orders of the chancellor. The chancellor may, at any time, for whatever may seem to him sufficient cause, remove the receiver, and not a dollar expended in operating the road can be allowed to the receiver, in his accounting with the trust, except by the order of the chancellor. All outlays made in behalf of the trust must either be authorized in advance, or subsequently ratified by the chancellor. Whatever is not so authorized or ratified, cannot be charged against the trust. This presents the whole argument in a single sentence. It is thus demonstrated, as it seems to me, that nothing the receiver can possibly do, by contract or expenditure, can be made effectual against the trust without the sanction of the chancellor.”⁷

The express power given by the act of February 11, 1874 (G. S., p. 974), to operate an insolvent railroad for the use of the public, is not conferred on the receiver as an independent person, but as an officer of the court. The legislative intent is to extend the power to operate the railroad previously possessed, and to require its exercise for the benefit of the public. When an insolvent railroad is operated under these powers, the court may control its operation and the chancellor may personally direct or make contracts for that purpose, or he may confer a discretionary authority to make such contracts upon the receiver. Contracts made by a receiver, by virtue of such discretionary authority, are, in some respects, *sui generis*; they bind the receiver, not personally, but as the representative of the trust, and are to be

6—In re N. J. & N. Y. Ry. Co., 29 N. J. Eq. 67 (1878).

7—Van Fleet, V. C., in Lehigh Coal & Navigation Co. v. Central R. R. Co. of N. J., 35 N. J. Eq. 426 (1882).

enforced, or redress for their breach is to be accorded, out of the fund; but he who contracts with the receiver does so with the knowledge that, for any injury received thereby, he can only get redress by obtaining permission of the court, whose officer the receiver is, to sue at law, or to proceed against him in the court of chancery and, in either case, by satisfying that court that the claim is well founded. If, on examination, the contract appears to be improvident or detrimental to the trust, it should not be enforced, nor should damages for its nonperformance be awarded. But if the contractor made the contract in ignorance of its improvidence, and has in good faith prepared to perform it, and if, by its non-performance, he suffers actual loss without his fault, then the fund, the representative of which has misled him, ought to reimburse his actual loss.⁸

In *Vanderbilt v. Little*,⁹ it was held that in determining the compensation to be awarded under the rule laid down in a previous decree in the cause, founded on the opinion reported in 43 N. J. Eq. 669 (*Vanderbilt v. Central R. R. Co.*), that it was proper to treat the performed portions of the contracts with the receiver as settled and adjusted, and to take into account only the loss upon the unperformed portions thereof; that unpaid and unadjusted claims of subcontractors, arising upon breach of their subcontracts, ought not to enter into the account; that advances to subcontractors ought not to be taken into account except when materials were delivered upon the subcontract, so that such advances became expenditures in procuring materials for performing the contracts with the receiver, which were annulled with the approval of the chancellor.

Where property of an insolvent corporation is at the time of the appointment of a receiver incumbered with mortgages or other liens, the legality of which is brought in question, and the property is of a character materially to deteriorate in value pending the litigation, the court of chancery may order the receiver to sell the same, clear of incumbrances, at public or private sale, for the best price that can be obtained, and pay the money into the court, there to remain subject to the same liens and equities of all parties in interest as was the property before sale, to be disposed of as the court shall direct.¹⁰

"The power to order a sale clear of encumbrances, depends upon two pre-requisites specified in the statute. The legality of the lien must be brought in question, and the property must be of a character materially to deteriorate in value pending the litigation. The counsel for the trustees would give to the phrase 'legality of the mortgage,' a narrow and limited signification, entirely inconsistent with a liberal construction of the act, and totally destructive of its beneficent provisions. They seek to confine its operation to cases only where legal

8—*Vanderbilt v. Central R. R. Co.*, 43 N. J. Eq. 669 (Court of Errors & Appeals, 1887).

9—51 N. J. Eq. 289 (Court of Errors & Appeals, 1893).

10—Corporation Act, § 81.

objections are raised to the validity of the mortgage itself, and to exclude all questions in relation to the equities arising as to the extent of the lien created by it, and its relative priority as to other encumbrances. A mortgage may be a legal lien upon the mortgaged premises; its legality, so far as the mortgagor is concerned, may be undoubted, but as against other parties, in a court of equity, it may be wholly inoperative, and may be entirely frustrated by equities arising in favor of subsequent liens. The object of the legislature was the prevention of loss by the depreciation in value of the property, pending protracted litigation. The mischief and the remedy proposed are plainly apparent upon the face of the act. It was not intended to confine the remedy to mischief arising from litigation of any particular character, but to all litigation between encumbrancers respecting the validity, extent, or priority of their liens. The act must be so construed as to suppress the mischief and advance the remedy."¹¹

The chancellor has discretionary power to order a sale of the franchises, as well as of the property of the insolvent company, clear of encumbrances.¹²

When a sale is made by the receiver, under section 81 of the Corporation act, although there are outstanding bonds secured by the mortgage whose lien on the mortgaged premises will be discharged by the receiver's sale, the mortgagee and bondholders have no control whatever over the conditions of sale, the acceptance of bids or the postponement, if the bids are too low. Their only opportunity to protect themselves in case of misjudgment on the part of the receiver is by an application to refuse confirmation of a sale which they did not ask for, over which (although they have a superior lien) they have no control, and which takes from them the property mortgaged to them. "That, I think, is an additional reason which should lead this court to listen favorably to the present application, and to hesitate to compel these bondholders to accept as a price for the property mortgaged to them, a bid of only one-seventh of the amount of their bonds. There is something to be said, however, with regard to the attitude of these creditors who resist confirmation of this sale. They ought not to be permitted to require this property to be put up again for sale without giving some assurance that substantially higher bids shall be secured. The practice in such cases was indicated by the mode of procedure in the case of *Rowan v. Congdon*, 53 N. J. Eq. 385 (1895). The court of appeals in that case refused, because of gross inadequacy of price, to change the order of the chancellor confirming a sale, unless within thirty days after the remission of the record to the court of chancery some prospective purchaser should enter into bond, with security sat-

11—*Randolph v. Larned*, 27 N. J. Eq. 557 (Court of Errors & Appeals, 1876); see also *Reilly v. Penn Cordage Co.*, 58 N. J. Eq. 459 (1899).

12—*Randolph v. Larned*, 27 N. J. Eq. 557 (Court of Errors & Appeals, 1876).

isfactory to the chancellor, that in the event of a resale a greater bid would be made for the mortgaged premises." ¹³

Where a receiver sells property subject to the lien and encumbrances of a specified mortgage, the purchaser at such sale is thereafter estopped from denying its validity.¹⁴

Exceptions to a final account of the receiver of an insolvent corporation will not be considered if they relate to matters which could have been urged against making the decree of insolvency, or upon an order to show cause why a previous account of the receiver should not be set aside, obtained by the exceptant.¹⁵

102. ACTIONS AND PROCEEDINGS BY AND AGAINST RECEIVERS.

A receiver is not amenable to the process or order of any other court than that appointing him, nor suable anywhere except by the permission of the court appointing him. The reason this restraint is imposed on the right to sue, is that the property in the possession of the receiver is, in fact and in law, in the possession of the court, and subject alone, at least in the first instance, to its order and control. The duty and responsibility of doing justice, by judgment, in respect to the disposition of the property, rests wholly upon the court having possession. No other tribunal has a particle of power, as a matter of original jurisdiction, to dispose of the most trifling part of the property. It is obviously impossible, therefore, for the court having possession of the property to perform its duty in respect to the property, unless it takes to itself jurisdiction of all questions concerning its disposition, or so far controls the proceedings by which such questions are determined, as to make the result reached the judgment, in effect, of that court. "Our statute directs that when a railroad corporation has become insolvent, and the chancellor has taken possession of its property, by the appointment of a receiver, the receiver shall operate the road for the use of the public, subject, at all times to the orders of the chancellor, and the operating expenses are made a first lien on its earnings. As I read this statute, it puts the franchises and property of the corporation in the possession of the chancellor for two purposes—first, to have the road operated for the use of the public, and second, to have its franchises and property disposed of and administered for the benefit of its creditors and stockholders." ¹

A person having a legal cause of action against a receiver appointed by the Court of Chancery, has a right to pursue his redress by an action at law. Such action cannot be brought without the permission of

¹³—*Porch v. Agnew Co.*, 66 N. J. Eq. 232 (1904).

¹⁴—*Camden Safe Deposit & Trust Co. v. Citizens' Ice & Cold Storage Co.*, 71 N. J. Eq. 221 (Court of Errors & Appeals, 1907).

¹⁵—*Strauss v. Casey Machine Supply Co.*, 69 N. J. Eq. 19 (1905).

¹—*Van Fleet, V. C.*, in *Lehigh Coal & Navigation Co. v. Central R. R. Co.*, 38 N. J. Eq. 175 (1884).

the chancellor, but such permission cannot be refused, unless the claim preferred be manifestly unfounded and vexatious.²

And it is a general rule that in suits by and against receivers, legal remedies must be enforced in the common law courts and equitable remedies must be enforced in the court of chancery. Merely, by virtue of his appointment as a receiver in a proceeding in the court of chancery, the receiver has not the right to sue in that court nor is he liable to suit therein.

This rule, however, is not inflexibly applied. Thus where a person not a party to the suit in which he was appointed having presented a petition to the court setting up a right to the possession of certain land in the possession of the receiver, as such, praying the court of chancery to adjudicate upon his rights, and to direct the receiver to deliver possession to him, it was held that in the absence of any appearance of a ground of claim of right of possession on the part of any other party not before the court, the court of chancery will hear and determine the petitioner's claim, although it was one within the jurisdiction of a court of law.³

The court of chancery has the right, in proceedings to wind up the affairs of insolvent corporations, to direct the receiver to make a call upon subscribers to pay up their unpaid subscriptions to the capital stock. Where such call has been made by the receiver, his right of action against such subscribers is a legal right to be pursued in a court of law. An objection to the jurisdiction of the court of equity that the remedy at law was complete and raised by the answer will be sustained at the hearing. The court said: "A court of equity has the undoubted right, in winding up the affairs of the insolvent corporation, to authorize the receiver to make a call where the corporation has failed to do so. But this authority to the receiver to act in the place and stead of the corporation in making the call, does not change the character of the stockholders' liability on the call from a legal to an equitable obligation. It leaves the stockholders subject to the same kind of action by the receiver that he would have been subject to in favor of the company, but to no other. I must therefore hold that each of the defendants has the right to have the validity of the receiver's claim for his subscription tried in the legal tribunal, and the bill must, as to the defendants who have answered, be dismissed."⁴

Where it is necessary to have an adjudication that an issue of stock in payment of property purchased is void under the statute on the ground of overvaluation by the directors, the liability of the stockholders may be determined in a suit in equity brought by the receiver for the purpose.⁵

A receiver of an insolvent railroad company, empowered by statute

2—*Palys v. Jewett*, 32 N. J. Eq. 302 (Court of Errors & Appeals. 1880).

3—*Potter v. Spar Spring Brick Co.*, 47 N. J. Eq. 442 (1890).

4—*Barkalow v. Totten*, 53 N. J. Eq. 573 (1895).

5—See section 64 above.

to operate the railroad for the use of the public, acting as a common carrier, in the carriage of passengers, is not a public officer, entitled to immunity as such, but may be sued at law, in his representative capacity, by leave of the court appointing him, as the company might be, for negligence of his agents in operating the road, resulting in the death of a passenger.⁶

The Court of Chancery will entertain jurisdiction of a suit against a receiver upon a contract made with a former receiver, where the claim is against the trust funds of the railroad company, which are still under the control of the court.⁷

A bill by a receiver of an insolvent corporation, alleging that the defendant under a void chattel mortgage from the corporation by taking possession of its chattels and selling them, wrongfully realized unknown sums of money for which the bill prays he may be decreed to account to the receiver, states a sufficient ground of equitable jurisdiction.⁸

Where the receiver of an insolvent corporation refuses to bring suit, a creditor and stockholder thereof may, for the benefit of himself and of such other creditors and stockholders as elect to join him, maintain a suit against the president and directors for gross official neglect and mismanagement, whereby the corporation was financially ruined.⁹

Such receiver shall, upon application by him, be substituted as party plaintiff or complainant in the place and stead of the corporation in any suit or proceeding at law or in equity which was pending at the time of his appointment.¹⁰

No action against a receiver of a corporation shall abate by reason of his death, but, upon suggestion of the facts on the record, shall be continued against his successor, or against the corporation in case no new receiver be appointed.¹¹

103. PRESENTATION TO AND ALLOWANCE OF CLAIMS BY RECEIVER.

Every claim against an insolvent corporation shall be presented to the receiver in writing and upon oath; and the claimant, if required, shall submit himself to such examination in relation to the claims as the receiver shall direct, and shall produce such books and papers relating to the claim as shall be required; and the receiver shall have power to examine, under oath or affirmation, all witnesses produced before him touching the claims, and shall pass upon and allow or dis-

6 *Little v. Dupont*, 46 N. J. L. 614 (Court of Errors & Appeals, 1884).

7 *Ferry v. Little*, 39 N. J. Eq. 83 (1884).

8 *Fryer v. Gray*, 70 N. J. Eq. 418 (1895), affirmed 72 N. J. Eq. 436 (Court of Errors & Appeals, 1897).

9 *Ackerman v. Halney*, 37 N. J. Eq. 356 (1883), affirmed 38 N. J. Eq. 601 (Court of Errors & Appeals, 1884).

10 Corporation Act, § 70.

11 Corporation Act, § 80.

allow the claims, or any part thereof, and notify the claimants of his determination.¹

The decree of insolvency, while fixing the status of the complainant as a creditor for the purpose of qualifying him to sue, does not make it *res adjudicata* that he is entitled to any of the assets. He is obliged, after the final decree for an injunction has been obtained upon his motion and through his instrumentality, to prove his claim against the assets precisely as all the other creditors must prove their claims, and his entire claim may be rejected.²

The receivers in the admission or rejection of testimony, are to be governed by the rules of evidence. The rules of evidence are generally the same in equity as at law, and questions of the competency and incompetency of witnesses, and other proofs, the same in both courts.³

In view of the provisions of sections 75, 76 and 77 of the Corporation act, it is held that a claimant for a tort committed before the declaration of insolvency, but not reduced to judgment until after, can come in and share on an equality as a creditor pursuant to section 86, providing for the distribution of the assets among "the creditors."⁴

A stockholder who participated actively in a transaction that resulted in an improper issuance of stock and himself received a part of such stock is not estopped from participating as a creditor in proceedings taken to enforce the liability of delinquent stockholders by the circumstances that the stock certificates were marked "full paid" and "issued for property purchased," where the stockholders knew the fact to be otherwise. Such a stockholder is not debarred by operation of the maxim *in pari delicto potior est conditio defendentis* from enforcing against the stock any just claims he may have as a creditor of the company. The agreement for improper issuance of the stock being absolutely void on grounds of public policy, his rights as a creditor remain unimpaired.⁵

The court of chancery may limit the time within which creditors shall present and make proof to such receiver of their respective claims against the corporation, and may bar all creditors and claimants failing so to do within the time limited from participating in the distribution of the assets of the corporation; the court may also prescribe what notice, by publication or otherwise, shall be given to creditors of such limitation of time.⁶

The design of the statute is to secure an equal distribution of the assets of the corporation among all its creditors. In practice, an or-

1—Corporation Act, § 76.

2—Gallagher v. Asphalt Co. of America, 67 N. J. Eq. 441 (1904).

3—Runyon v. Farmers' & Mechanics' Bank, 4 N. J. Eq. 480 (1845).

4—Lehigh & Wilkesbarre Coal Co. v. Stevens & Condit Trans. Co., 63 N. J. Eq. 107 (1902).

5—Easton National Bank v. American Brick, etc., Co., 70 N. J. Eq. 732 (Court of Errors & Appeals, 1906).

6—Corporation Act, § 75.

der is made limiting a time within which claims shall be presented and approved, in order to facilitate the proceedings, and to promote dispatch in the settlement of the estate. But no creditor thereby obtains a vested right to a certain dividend to the exclusion of others. If a reasonable excuse for delaying to make an earlier claim is shown, the creditor will be admitted at any time before actual distribution, or even after partial payments, if there be a surplus in the hands of the receivers, so as not to interfere with payments already made.⁷

A person having a claim which does not appear to be valid and meritorious, will not be permitted to present it to the receiver for his consideration and action after the time limited by order of the court for such presentation has expired, and especially is this so when it appears that the failure to present the claim in due time was not the consequence of misapprehension or want of actual notice, but the result of careless indifference or of intentional delay.⁸

Where his claim is meritorious, however, a claimant may be permitted to present his claim beyond the time limited, within the discretion of the chancellor.⁹

Thus, where certain secured bondholders of an insolvent corporation were not notified by mail, with the other creditors, of the time limited for the presentation of claims against the corporation, although the order of limitation was published and the time expired and the bondholders found their security insufficient to pay them in full, and applied to be admitted as creditors for the balance, it was held that the application should be granted.¹⁰ It was held that they were also entitled to a preferential dividend to put them on equality with the other creditors, who had already received a dividend on their claims.

Any creditor or claimant who shall lay his claim before such receiver may, at the same time, demand that a jury shall decide thereon and in like manner the receiver may demand that the same shall be referred to a jury; and in either case such demand shall be entered on the minutes of the receiver, and thereupon an issue shall be made up between the parties, under the direction of one of the justices of the supreme court, and a jury impanelled, as in other cases, to try the same in the circuit court of the county in which the corporation carried on its business or had its principal office; the verdict of the jury shall be subject to the control of the supreme court, as in suits originally instituted therein, and when rendered, if not set aside by the court, shall be certified by the clerk of the supreme court to the receiver; the creditor shall be considered, in all respects, as having proved his debt or claim for the amount so ascertained to be due, and in all cases in which no trial by jury shall be demanded the court of chancery shall have jurisdiction to pass upon the claims presented and to determine

7—Grinnell v. Merchants' Ins. Co., 16 N. J. Eq. 283 (1863).

8—Leo v. Green, 52 N. J. Eq. 1 (1893).

9—Wall v. Young, 54 N. J. Eq. 24 (1895).

10—Pattberg v. Pattberg & Bros., 55 N. J. Eq. 604 (1897).

the rights of the claimants, and to make such order or decree touching the same as shall be equitable and just.¹¹

Every such insolvent corporation, or any person aggrieved by the proceedings or determination of such receiver in the discharge of his duty, may appeal to the court of chancery, which court shall, in a summary way, hear and determine the matter complained of, and make such order touching the same as shall be equitable and just.¹²

A person who files a claim with a receiver of an insolvent corporation, and sustains his claim before the receiver and before the Court of Chancery on appeal, is not a complainant within the meaning of the 91st section of the Chancery Act and is not entitled to the allowance of a counsel fee to be included as taxable costs.¹³

An order of the chancellor on appeal from the determination of the receiver of an insolvent corporation is final and not interlocutory, and is therefore appealable to the Court of Errors and Appeals.¹⁴

The language of the act is very comprehensive, and would seem to have been adopted for the purpose of embracing every question which could possibly be brought before the receivers for their action, and by which action any person could complain of being aggrieved. The section gives the right of appeal to any person or persons whatever, who think themselves or himself aggrieved by the proceedings or determination of the said receiver or receivers, or trustees, in the discharge of their duty; and the chancellor is to hear and determine the matter complained of in a summary way, and make such order touching the same as shall be equitable and just. And the right of appeal is not confined to a creditor who has a naked claim against the company, but extends to questions where a set-off is involved. So, where parties applying to receivers for a settlement of their accounts with a bank, admitted that the bank held their promissory note, but claimed a set-off, and insisted that the bank was largely indebted to them for interest, etc., and the receivers decided upon the accounts of the respective parties, and refused to allow the set-off, it was held that they were "parties aggrieved" by the determination of the receivers, and they could not be denied the right of appeal given them by the statute.¹⁵

The appellant, in his petition of appeal, should state his case fully, and the particulars in which he is aggrieved. By the answer of the receivers to the petition, the issue will be formally made between the parties. If there is no dispute as to the facts the case will be decided upon these pleadings. If the facts are controverted, proof can be taken in the ordinary way, and the matter be brought to a hearing and final determination, according to the usual practice in similar cases. It is one of those cases where the court will provide for the difficulties

11—Corporation Act, § 77.

12—Corporation Act, § 78.

13—*Porch v. Agnew Co.*, 72 N. J. Eq. 319 (1907).

14—*Ellison v. Gray*, 55 N. J. Eq. 581 (Court of Errors & Appeals, 1897).

15—*Jackson v. People's Bank*, 9 N. J. Eq. 205 (1852).

as they arise. The object of the statute will be attained, by disposing in a summary way, and with as little expense as possible, of all controversies which may retard the final settlement of the affairs of the insolvent institution. The petition should be so framed that the whole case is fully presented. A copy of the petition should be served on the receivers, with an order to answer in twenty days, and the petitioners should bring the appeal to a final hearing within thirty days after answer, and on giving eight days' notice. On failure of the petitioners bringing the appeal to hearing, the receivers are at liberty to have the appeal dismissed, or to notice the same for hearing, at their option.¹⁶

Where there is the same receiver for two corporations, one of which as part of its assets owns stock in the other, a creditor of the one has such interest that he may appeal from an allowance of the claim against the other.¹⁷

104. EFFECT OF APPOINTMENT OF RECEIVER ON UNFULFILLED CONTRACTS, CLAIMS FOR PERSONAL SERVICES, FOR RENT OF LEASED PREMISES, ETC.

The day on which insolvency occurred, as adjudged by the order appointing the receiver, fixes the time to which the several claims of creditors must be referred for adjustment. The order in the insolvency proceedings puts an end to the business of the company and terminates its contracts. Any other view would compel the creditors of the company to continue the business with the property and funds of the company, which the insolvency proceedings contemplate shall be divided among the creditors as of the time when the insolvency occurred.¹

"The general scheme of the act contemplates the ascertainment and payment of all just liabilities. The terms 'creditor' and 'debt' are not used in a narrow, restrictive, or technical sense. It could hardly have been the intention of the lawmakers to distribute the surplus of assets, or, in other words, return capital, to the stockholders of the company (that is, to those who deliberately ventured for gain, and pledged their capital for the security of those who were induced to deal with them), and at the same time disregard those who, dealing with those stockholders upon the faith of that security, became justly entitled to damages for breaches of contracts occasioned by an insolvency and suspension that the very capital relied upon was intended to ward off. Such distribution would be the protection of capital against its just liability. The receiver is bound in duty and clothed with power to reach out and take in every conceivable asset due or thereafter to accrue to the corporation. A complete collection of assets is contemplated, and a full and final distribution of them is made possible. Such being the

16—*Jackson v. The Peoples Bank*, 9 N. J. Eq. 205 (1852).

17—*Blake v. Domestic Manufacturing Co.*, 64 N. J. Eq. 480 (1897).

1—*Gray v. Reynolds*, 55 N. J. Eq. 501 (Court of Errors & Appeals, 1897); relating to insurance contracts.

situation, natural justice demands that those who suffer from breaches of contract should be included in the distribution, even though the breaches and consequent damages follow the insolvency, and I think it is in consonance with the scope and design of the legislation considered, to give to the statute a broad and liberal interpretation which will admit of that justice being done." It was held, therefore, that a person who had entered into an agreement with the corporation to serve it for a term of years, in consideration of which he was to receive a fixed salary, was entitled to present a claim to the receiver for the amount of the damages he suffered by the breach; that those damages were to be ascertained by an issue framed by a Justice of the Supreme Court and tried by a jury; but that such claim was not entitled to preference under the eighty-third section of the act concerning corporations.²

And in a recent case the Court of Errors and Appeals said "Every-one who deals with such a corporation does so in view of the fund its capital provides, and the security that fund is intended to afford. The stockholders who provide the fund invite confidence because of it, that through such confidence their venture may be profitable to them. The mere statement of this situation makes conspicuous the injustice of any course of reasoning which will return to the stockholders their capital before satisfaction of all losses induced by faith in it shall be made. The state creates corporations and requires of them the provision of such a trust fund, and when it destroys their corporate existence, natural justice requires that it shall provide for distribution of the fund so that no part of it shall be returned to those who offer it as security for the action of others, until the latter shall have all the protection against loss in their undertaking that it is capable of affording. * * * By the terms of the decree which forfeits the defendant's charter, the corporation is not dead so far as the ascertainment of its obligations and their satisfaction are concerned."³

In proceedings against an insolvent corporation, the owner of the premises upon which that corporation carried on its business, under a lease from him, is entitled to an order directing the receiver to pay the amount of rent due at the time of the declaration of insolvency, not exceeding one year's rent. Section 4 of the act respecting Landlords and Tenants provides, that no goods and chattels being upon any lands or tenements which are or shall be leased, shall be liable to be taken by virtue of any execution, attachment or other process, unless the party at whose suit the said execution or other process is issued shall, before the removal of such goods from off the said premises, pay to the landlord all rent due for said premises not exceeding one year's

2—Spader v. Mural Decoration Manufacturing Co., 47 N. J. Eq. 18 (1890).

3—Rosenbaum v. Credit System Co., 61 N. J. L. 543 (Court of Errors & Appeals, 1898); Bolles v. Crescent Drug & Chemical Co., 53 N. J. Eq. 614 (1895).

rent. "There can be no room for doubt that the order of this court directing the receiver to take possession of the goods and chattels of the defendant company, is included in the phrase, 'other process.'" ⁴

In another case it was held, however, that a lessor in a lease for a term of years at a designated annual rental, which gives the lessor the right of re-entry in case of a failure to pay the rent, is not entitled on the insolvency of the lessee corporation, to demand from the receiver the rent accruing under the lease after the receiver quits the premises. Vice-Chancellor Pitney said: "If I properly understand the report of the case of *Stockton v. Mechanics Bank*, 32 N. J. Eq. 163 (1880), the question presented by this appeal is *res judicata* in this court." ⁵

105. COMPENSATION OF RECEIVER AND COSTS AND EXPENSES OF ADMINISTRATION.

Before distribution of the assets of an insolvent corporation among the creditors or stockholders the court of chancery shall allow a reasonable compensation to the receiver for his services and the costs and expenses of the administration of his trust, and the costs of the proceedings in said court, to be first paid out of said assets.¹

Receiver's allowances and his expenses in winding up the company are entitled to preference over state franchise taxes.²

The receiver is entitled to have an allowance for his fees and those of his counsel included in an assessment against the stockholders.³

Without the order of the court, receivers' services in themselves, "stand on no higher claim than receivers' debts for the services and advances of other persons for the benefit of the trust, and where, as in this case, the fund in the receivers' hands is not sufficient to pay all the receivers' debts and their compensation, the distribution must be pro rata. * * * If receivers desire or intend to claim preference in payment for their own compensation they must apply to the court not only for such order, but also for the authority to incur indebtedness, which will be subject to their claim. Upon such application, the court can, by proper inquiry into the condition of the estate make the orders necessary to control its receivers in the incurring of indebtedness, and also to give notice to persons dealing with the receivers for services to the trust, that the receivers' personal claims for services are preferred." ⁴

4—Wood v. McCardell, etc., Co., 49 N. J. Eq. 433 (1892).

5—Klein v. Gavenesch Co., 64 N. J. Eq. 50 (1902).

1—Corporation Act, § 85.

2—Chesapeake & Ohio Ry. Co. v. Atlantic Transportation Co., 62 N. J. Eq. 751 (Court of Errors & Appeals, 1901).

3—Cumberland Lumber Co. v. Clinton Hill Lumber Co., 64 N. J. Eq. 521 (1903).

4—Nessler v. Industrial Land Development Co., 65 N. J. Eq. 491 (1903); reversed on account of clerical error only, 64 Atl. 109 (Court of Errors & Appeals, 1906).

An allowance of \$4,000 to receivers, and \$2,500 to their counsel, which, with the costs and disbursements incurred, was a little more than four per cent. on the amount administered, was held to be not excessive, where the plant of the insolvent corporation is equipped for its particular work, so that it is necessary to operate the same to preserve it, and there is considerable work and skill involved in selling the property and protecting the various equities.⁵

Where the possession of mortgaged property by receivers of the mortgagor has continued with the actual or implied consent of the mortgagees, and their possession has been a benefit to the estate, any claim of the mortgagees to funds which come into the receivers' hands is equitably subject to all proper expenses of the receivership.⁶

The court will authorize a receiver of a railroad company to make all necessary repairs, and, if necessary, will charge the expense as a first lien on the property prior to existing mortgages thereon.⁷

Where, however, property of a corporation was placed in the hands of a receiver, and the realty was expected to realize more than enough to pay a mortgage thereon, and the receiver expended money in care of it while endeavoring to find a bidder, but on a sale it did not realize enough to pay the mortgage debt, it was held that the mortgagee should not be required to contribute to the general fund of the estate the amount spent for repairs.⁸

106. ORDER OF PAYMENT OF CLAIMS AND DISTRIBUTION OF SURPLUS FUNDS.

In adjusting the priorities of several encumbrancers on lands of an insolvent corporation it was held: (1) That banks which had loaned money to such corporation on notes endorsed by its creditors, were entitled to be subrogated to the rights of such directors, under a mortgage given to them by the corporation to indemnify them for such endorsements; (2) That the receiver had power to adjust by agreement the rights of claimants under the mechanics lien law, although no steps beyond filing their claims had been taken; (3) That where such claims have passed into judgment with the receiver's knowledge, they should be regarded as established; and (4) That where a lien claim was filed after the beginning of the insolvency proceedings in the Court of Chancery, it is not necessary to pursue such claim to judgment unless so required by the court or receiver.¹

In case of the insolvency of any corporation the laborers and workmen, and all persons doing labor or service of whatever character, in

5—*Lembeck v. Jarvis Terminal Cold Storage Co.*, 68 N. J. Eq. 352 (1904).

6—*Nessler v. Industrial Land Development Co.*, 65 N. J. Eq. 491 (1903); reversed on account of clerical error only, 64 Atl. 109 (Court of Errors & Appeals, 1906).

7—*Hoover v. Montclair & Greenwood Lake Ry. Co.*, 29 N. J. Eq. 4 (1878).

8—*Cunningham v. Alryan Woolen Mills*, 69 N. J. Eq. 710 (1905).

1—*DeMott v. Stockton Paper Ware Mfg. Co.*, 32 N. J. Eq. 124 (1880).

the regular employ of such corporation, shall have a first and prior lien upon the assets thereof for the amount of wages due to them respectively for all labor, work and services done, performed or rendered within two months next preceding the date when proceedings in insolvency shall be actually instituted and begun against such insolvent corporation.²

Such lien shall be prior to all other liens that can or may be acquired upon or against such assets, except the lien and incumbrance of a chattel mortgage, recorded more than two months next preceding the date when proceedings in insolvency shall have been actually instituted against such insolvent corporation, and except the lien and incumbrance of a chattel mortgage recorded within two months next preceding the date when proceedings in insolvency shall have been actually instituted against such insolvent corporation, for money loaned or for goods purchased within said period of two months; and also except as against the lien of mortgages given upon the lands and real estate of such insolvent corporation.³

The preference given by the eighty-third section of the corporation act is in derogation of the right of creditors to be paid equally, and will not be extended by construction. "The statute confers a special or exceptional right; it makes a distinction among persons having, according to the principles of natural justice, equal rights, and takes from all classes of creditors, secured and unsecured, except one, that that particular class may be paid in full. When a statute produces such a result, those who claim under it have a right to take what is clearly given by plain words, but nothing more. Looking at the manifest purpose of this statute, as well as at its words, I think it is quite obvious that the right conferred is strictly personal, inhering alone in the person who actually performs the labor or service, and that he who furnishes the labor or service of others, under a contract to do the whole business of the corporation, or a particular branch of it, is neither within its words nor its spirit. In neither the strict nor the popular sense of the word is he an employe, but this relation to the corporation would be more aptly described by the word contractor."⁴

So, also where a superintendent of the work of constructing a railroad, without any obligation on his part, voluntarily, and supposing that the company was solvent, and merely to befriend the workmen employed, advanced his own money to pay them for work, where there was no assignment of their claims to him, and no agreement that he was to have the benefit of their lien, and afterwards the company became insolvent, it was held that he was not, by subrogation, entitled to the workmen's statutory lien for those payments.⁵

²—Corporation Act, § 83.

³—Corporation Act, § 84.

⁴—*Lehigh Coal & Navigation Co. v. Central R. R. Co. of N. J.*, 29 N. J. Eq. 252 (1878).

⁵—*North River Construction Company's case*, 38 N. J. Eq. 433 (1884); affirmed 40 N. J. Eq. 340 (Court of Errors & Appeals, 1885).

And it has been held that a person, not in the employ of an insolvent corporation, who loaned money to the corporation upon an understanding that it would be used to pay the wages of its laborers, is not, when the corporation is decreed to be insolvent, entitled to the preference allowed by section 83 of the General Corporation act.⁶

But if the laborer's claim be assigned after the lien has attached, the assignee is entitled to the benefit of the lien.⁷

In *Delaware, Lackawanna & Western R. R. Co. v. Oxford Iron Co.*, 33 N. J. Eq. 192 (1880), it was held, (1) That the lien comes into existence as of the date which the court adjudges to be the time when the insolvency occurred which gives it jurisdiction; (2) That persons holding claims for wages, who are not in the employ of a corporation at the time when it becomes insolvent, are not within the policy of the act, and therefore have no lien upon the assets thereof; (3) That the presentation of a claim, embracing other items than charges for wages, does not work a forfeiture of the right of lien for the wages, given by the statute; and (4) That the acceptance of a promissory note, without security, does not operate as a waiver of the lien given by the statute, unless an intention to relinquish such a right is unmistakably manifested.

The claims of laborers for services are not entitled to precedence in payment over liens acquired by judgment, execution and levy thereunder, or by distress for rent, which antedate the time which the court adjudges to be the time of the corporation's insolvency. Such time is when the court examines into and determines the existing condition of the corporation's affairs. The court will not undertake to investigate the financial ability of a company at previous periods.⁸

The statute does not give an employe creditor of a corporation priority over a creditor by mortgage recorded before the employe's debt accrued. The Court said: "The receiver takes the property subject to the mortgage. In his hands it is an asset only to the extent of the equity of redemption. The title is in the mortgagee; and it is well settled that this court will not, and, in fact, has no power to, authorize the receiver to sell the land free of the mortgage and pay the mortgage out of the proceeds."⁹

By the eighty-fourth section of the Corporation Act, labor claims are postponed to the lien of a chattel mortgage which has been recorded more than two months next preceding the date when proceedings in insolvency shall have been actually instituted against an insolvent corporation.¹⁰

"The practice in this court, in allowing these statutory preferences,

6—*Campbell v. Taylor Mfg. Co.*, 64 N. J. Eq. 622 (1902); affirmed 64 N. J. Eq. 791 (Court of Errors & Appeals, 1902).

7—*D. L. & W. R. R. Co. v. Oxford Iron Co.*, 33 N. J. Eq. 192 (1880).

8—*Wright v. Wynockle Iron Co.*, 48 N. J. Eq. 29 (1891).

9—*Hinkle v. Camden Safe Deposit & Trust Co.*, 47 N. J. Eq. 333 (Court of Errors & Appeals, 1890).

10—*Buvinger v. Evening Union Printing Co.*, 72 N. J. Eq. 321 (1907).

has been to limit them to persons who were within the class named in the statute. *Consolidated Coal Co. v. Keystone Chemical Co.*, 54 N. J. Eq. 310 (1896). The terms used in the act expressly prescribe that the preference is given to laborers and workmen and persons doing labor in the regular employ of the company at the time of the insolvency. It is a purely statutory right, and it was probably created for the purpose of preventing a general exodus of the workmen employed by corporations in anticipation of the failure of the company. It is intended to induce employes to remain at their work, even if financial disaster be threatened, by assuring them that they shall not lose their wages. A company which has a large number of employes may be in some financial straits, and may yet, if it can continue its business, regain its prosperity. But if its employes, anticipating that their wages will not be paid, leave its employ in a panic, absolute disorganization and destruction of the business may follow. The statute here intervenes and assures them that they, at all events, shall be paid. It refers, by its very words, to laborers, workmen and employes only, giving them a preference."¹¹

The general manager of a corporation, who is also a stockholder and a member of the board of directors, is entitled to preference for two months' wages next preceding the institution of proceedings of insolvency; the court said: "The present claim is made under section 83 of the Corporation Act. The case of *England's Executors v. Beatty Organ Co.*, 41 N. J. Eq. 470 (1886), was decided under the provision of the Statute of 1869 (P. L. 1869, p. 1448; Rev. p. 188.) It was there held that the president of a corporation was not a laborer within the meaning of the old act. Section 83 of the present Corporation Act is practically the same as section 1 of the Act of April 8, 1892 (P. L. 1892, p. 426.) Under the latter act, it was held, in *Consolidated Coal Co. v. Keystone Chemical Co.*, 54 N. J. Eq. 309 (1896), that the bookkeeper of a corporation, though a director, was entitled to the preference given by the act. It was there noted that the later act is broader in its scope than the former one; and the view was also taken that while the duties of a president of a corporation may well be confined to matters supervisory in their nature, those of a bookkeeper involve labor in the strict sense of the word. In *Campbell v. Taylor Mfg. Co.*, 64 N. J. Eq. 622, it is suggested that the preference given by this statute to employees of a corporation, was probably created for the purpose of preventing a general exodus of the workmen employed by the corporation in anticipation of the failure of the company. I am impressed that in this suggestion is to be found the true purpose and underlying spirit of the act. While the duties of the present claimant may not have involved the degree of manual labor which ordinarily falls to a bookkeeper, yet I think it clear that he is included in the spirit and purpose of the legislation. The language of the statute is, 'All persons doing labor or service, of what-

¹¹—*Campbell v. Taylor Mfg. Co.*, 64 N. J. Eq. 622 (1902); affirmed 64 N. J. Eq. 791 (Court of Errors & Appeals, 1902); see also *Watson v. Watson Manufacturing Co.*, 30 N. J. Eq. 588 (1879).

ever character in the regular employ of such corporation.' If the recognized purpose of the statute be the preservation of the organized operative force of a corporation in a time of embarrassment, this language clearly must be held to include the general manager, even though he be a director and therefore a member of the board which employed him. His retention as the immediate supervisor and organizer of the operative force of employees, is peculiarly essential to the accomplishment of the purposes of the act."¹²

Apprentice workmen, who have allowed their wages to accumulate upon an agreement that they should be paid at the end of their apprenticeship, have no more extensive right to a preference than have any other unpaid workmen in the regular employ of the insolvent corporation.¹³

Preferred claims for labor are to be paid in full unless it be necessary to encroach upon them to meet the expenses of the receivership.¹⁴

The State of New Jersey does not possess the Crown's common law prerogative to have its debts paid in preference to the debts of other creditors.¹⁵

The Franchise Tax Act of 1884 provides (§ 6) that the tax imposed by the act when determined, shall be a debt due from said company to the state, for which an action at law may be maintained after the same shall have been in arrears for the period of one month; such tax shall also be a preferred debt in case of insolvency.

A franchise tax levied by the state during the receivership of an insolvent corporation is entitled to payment in preference to the liabilities incurred by the receivers in carrying on the business of the insolvent corporation, but not to payment in preference to the receivers' allowance and the expenses of winding up the corporation.¹⁶

In an early case it was held that where an insolvent corporation is of a mere private character and it is not the duty of the receiver to preserve the franchise, and he does not, in fact, exercise the franchise, he will not be obliged to pay any other franchise tax than that which was due at the time of his appointment, unless he shall realize from the assets of the company more than sufficient to pay its debts and the expenses of the receivership, and then, before distributing to stockholders, he will pay any franchise tax that may have been assessed subsequent to his appointment, and that if the receiver shall continue its business, using its franchises, he shall pay the franchise tax assessed while he continues the business, using the franchise.¹⁷

12—*Buvinger v. Evening Union Printing Co.*, 72 N. J. Eq. 321 (1907).

13—*Mingin v. Alva Glass Manufacturing Co.*, 55 N. J. Eq. 463 (1897).

14—*Lyle v. Staten Island Terra Cotta Lumber Co.*, 62 N. J. Eq. 797 (Court of Errors & Appeals, 1901).

15—*Freeholders of Middlesex County v. State Bank at New Brunswick*, 30 N. J. Eq. 311 (Court of Errors & Appeals, 1878).

16—*Chesapeake & Ohio Ry. Co. v. Atlantic Trans. Co.*, 62 N. J. Eq. 751 (Court of Errors & Appeals, 1901).

17—*Mathers' Sons Co.'s Case*, 52 N. J. Eq. 607 (1894).

Under the supplement of 1901 to the Franchise Tax Act, (P. L. 1901, p. 31), making every corporation liable to a franchise tax unless its annual return shows that it is within the exempted clause, it was held that the receiver of an insolvent corporation must pay the tax, where no return has been made, even though prior to the year for which it was assessed he had converted all the corporate property into cash, and no business was thereafter carried on by it. "The imposition is laid without regard to the exercise of a franchise, but solely as a condition of its continued existence."¹⁸

It is advisable, therefore, to obtain the decree of dissolution as soon as possible in order to stop the payment of franchise taxes.¹⁹

The receiver of any corporation appointed by the court of chancery or any assignee in trust for the benefit of the creditors of the assignor shall take, receive and hold all personal property subject to all unpaid taxes and shall, out of the first moneys received by him or them, pay to the proper collecting officer of the municipality levying the tax all said unpaid taxes, together with the interest and penalties thereon; this payment must be made before any other payments are made by any such receiver or assignee; *provided, however*, that nothing in this act contained shall in any way affect the lien of employes for wages now preferred by law.²⁰

Where property coming into the hands of a receiver is subject to a lien for personal taxes, for the enforcement of which no specific remedy is provided by statute, the chancery court, of which the receiver is an officer, has jurisdiction by reason of his possession of the property, to provide payment of the taxes, as a preferred claim, out of the proceeds of the property.²¹

After payment of all allowances, expenses and costs, and the satisfaction of all special and general liens upon the funds of the corporation to the extent of their lawful priority, the creditors shall be paid proportionately to the amount of their respective debts, excepting mortgage and judgment creditors when the judgment has not been by confession for the purpose of preferring creditors; and the creditors shall be entitled to distribution on debts not due, making in such case a rebate of interest, when interest is not accruing on the same; and the surplus funds, if any, after payment of the creditors and the costs, expenses and allowances aforesaid, and the preferred stockholders, shall be divided and paid to the general stockholders proportionally, according to their respective shares.²²

18—King v. American Electric Vehicle Co., 70 N. J. Eq. 568 (1905); see also In re United States Car Co., 60 N. J. Eq. 514 (Court of Errors & Appeals, 1899).

19—See United States Car Co. v. Crews, 57 N. J. Eq. 357 (Court of Errors & Appeals, 1899); Chesapeake & Ohio Ry. Co. v. Atlantic Trans. Co., 62 N. J. Eq. 751 (Court of Errors & Appeals, 1901).

20—P. L. 1896, p. 181.

21—Duryee v. United States Credit System Co., 55 N. J. Eq. 311 (1897).

22—Corporation Act, § 86.

A judgment which was not entered until after the appointment of a receiver is not entitled to preference.²³

A judgment at law which is fraudulent as against certain of the creditors of an insolvent corporation, but valid as against others, will not be set aside by the court in which it was entered at the instance of the receiver of such corporation by reason of fraud. The rights of those creditors as against whom the judgment is fraudulent, can be protected in the distribution of the company's assets by the court having control of that matter.²⁴

Whether or not the holder of the confessed judgment is barred under the eighty-sixth section of the Corporation Act from obtaining a preference over the creditors of an insolvent corporation depends not upon the intention with which the bond and warrant of attorney were given, but upon the intention with which the judgment itself was confessed. If the object to be attained in confessing the judgment was to give the holder thereof a priority over other creditors, consequences provided by the act necessarily follow, notwithstanding the fact that at the time of the execution of the bond and warrant of attorney no intention to prefer existed.²⁵

The equitable rule for distributing the assets of an insolvent corporation among its creditors when the assets are insufficient to satisfy all demands, is to apportion the assets pro rata among all the creditors upon the principle that equality is equity. Thus it was held that after a corporation had been adjudged insolvent and a receiver appointed to wind up its affairs, a mortgage given by the corporation, while insolvent [at a time when the statute did not prohibit preferences], to prefer some of its existing general creditors, which, through a mistake of the draughtsman, conveyed a life estate in its real property, ought not to be reformed by a court of equity so as to embrace the fee, when it appeared that the mortgagees did not act to their detriment on the supposition that the mortgage conveyed the fee.²⁶

Upon distribution of the assets of an insolvent corporation, the right of a preferred creditor to full payment outranks the right of a general creditor to partial payment.²⁷

But where the creditor has two funds, one separate and one in common with others, he must first look to his separate security, and after that is exhausted he may look to the fund in which others are interested.²⁸

Where the assets of an insolvent corporation are not sufficient to

23—*Kelly v. Neschanic Mining Co.*, 7 N. J. Eq. 579 (1849).

24—*Beebe v. The George H. Beebe Company*, 64 N. J. L. 497 (1900).

25—*Consolidated Coal Co. v. National State Bank*, 55 N. J. Eq. 800 (Court of Errors & Appeals, 1896).

26—*Miller v. Savage*, 62 N. J. Eq. 746 (Court of Errors & Appeals, 1900).

27—*Lyle v. Staten Island Terra Cotta Lumber Co.*, 62 N. J. Eq. 797 (Court of Errors & Appeals, 1901).

28—*State Bank v. Receivers of Bank of New Brunswick*, 3 N. J. Eq. 266 (1835).

satisfy its debts, a creditor holding collateral insufficient to pay his entire claim, is not entitled to hold such security and treat the same as security for the entire claim and to receive dividends out of the assets on the entire amount due at the time the corporation was declared insolvent, but he is entitled to dividends only on the balance of his claim, after applying the proceeds of the sale of his collateral.²⁹

Where a creditor who files a bill to obtain a decree of insolvency and an appointment of a receiver against an insolvent corporation desires to attack the validity of a claim of a co-creditor, he should do so upon proceedings had before the receiver on the question of the distribution of assets. It is improper practice to make such attack by a bill of complaint.³⁰

In *McGregor v. Home Insurance Co. of Newark*, 33 N. J. Eq. 181 (1880), it was held, that where preferred stock is issued under a contract or law containing no provision or direction as to what shall be the rights of the holders of it in the distribution of capital when the affairs of the company are wound up, a holder of such stock merely has a right to be preferred in the division of profits, and not in the distribution of capital. But it was held, that the general corporation act of this state directs that in the distribution of capital the holders of preferred stock shall be first paid, before any distribution is made to the holders of the common stock; that therefore, preferred stock issued in this state, either under authority of law or under a contract of which the law forms a part, is entitled to preference in the distribution of capital. This decision was overruled in *Lloyd v. Electric Vehicle Company*,³¹ in which the Court of Errors and Appeals held that the rights of preferred stockholders of corporations organized under the Corporation Act, upon a distribution in insolvency, are to be determined solely by the provisions of the certificate of incorporation.

29—*Butler v. Commonwealth Tobacco Co.*, 74 N. J. Eq. 423 (Court of Errors & Appeals, 1908).

30—*Consolidated Coal Company v. National State Bank*, 55 N. J. Eq. 800 (Court of Errors & Appeals, 1896).

31—72 Atl. 16 (1909).

IX. REINCORPORATION AND REORGANIZATION.

107. REORGANIZATION BY STOCKHOLDERS OF INSOLVENT CORPORATION.

Whenever a receiver shall have been appointed as aforesaid and it shall afterwards appear that the debts of the corporation have been paid or provided for, and that there remains or can be obtained by further contributions sufficient capital to enable it to resume its business, the court of chancery may, in its discretion, a proper case being shown, direct the receiver to reconvey to the corporation all its property, franchises, rights and effects, and thereafter the corporation may resume control of and enjoy the same as fully as if the receiver had never been appointed; and in every case in which the court of chancery shall not direct such reconveyance, said court may, in its discretion, make a decree dissolving the corporation and declaring its charter forfeited and void.¹

Whenever a majority in interest of the stockholders of such corporation shall have agreed upon a plan for the reorganization of the corporation and a resumption by it of the management and control of its property and business, such corporation may, with the consent of the court of chancery, upon the reconveyance to it of its property and franchises, mortgage the same for such amount as may be necessary for the purposes of such reorganization; and may issue bonds or other evidences of indebtedness, or additional stock, or both, and use the same for the full or partial payment of the creditors who will accept the same, or otherwise dispose of the same for the purpose of the reorganization.²

Construing section 69, Vice-Chancellor Bergen, in *Fleming v. Fleming Hotel Co.*, 70 N. J. Eq. 509 (1905), said: "It was not made to appear, either to the receiver or to the court, on the argument, that the debts had been paid or provided for, for I think it doubtful whether the words 'provided for' are answered by the extension of the time of payment, but rather that the payment should be provided for. There is, however, a more serious and to me insurmountable objection, in that it was not made to appear that there was any capital present, or obtainable by future contributions to enable a resumption of this business with safety to the public and advantage to the stockholders. Such jurisdictional facts being absent, the purpose for which the adjournment [of a sale by the receiver] was sought would have been fruitless, and I cannot discover in what manner these applicants would have been benefited by an adjournment."

After the appointment of a receiver of an insolvent corporation by

1—Corporation Act, § 69.

2—Corporation Act, § 70.

the Court of Chancery, and proceedings in foreclosure, an agreement among the secured and general creditors of the corporation, was entered into, whereby certain income bonds were to be issued, "payable in thirty years, with interest at seven per cent, payable half yearly," and the interest was to be paid, if the company should "be able to pay it by its income, after paying claims prior thereto within the year," and the annual interest should not be allowed to accumulate. A committee to arrange the details of the plan was appointed. It was held that the committee had authority to consent that the bonds should be made payable, at the option of the company, on or before the expiration of thirty years from the date of their issue. It was further held, however, that the receiver would not be ordered to pay the interest on the bonds while the floating debt of the company remained unpaid.³

108. REORGANIZATION BY PURCHASERS OF CORPORATE FRANCHISES AND PROPERTY.

Section 82 of the General Corporation Act in substance was originally enacted March 11th, 1842 (P. L. 1842 p. 164), and with minor changes has been preserved (Rev. Stat. 1846, p. 136. Tit. 5 Ch. 3, § 20; Rev. p. 192, § 85; P. L. 1896, p. 303, § 82.

The purchaser at a receiver's sale held pursuant to Section 82 of the Corporation Act of all the franchises of a gas company (including a franchise to lay gas pipes in the streets), holds such franchises, in view of the Act of February 17, 1881 (P. L. 1881, p. 33), as a body politic and corporate and has no power as an individual to convey such franchises to another person; and when a corporation, the lessee of the persons to whom such franchises were attempted to be conveyed and no other right, proceeds to exercise such franchise by opening and occupying the streets, it will be restrained on the information of the Attorney General.¹

The Court of Errors and Appeals said that construing Section 82 of the Corporation Act and the Act of 1881 (P. L. 1881 p. 33) together, "we find a definite disposition of the title to the chartered rights, privileges and franchises of the insolvent corporation. Under section 82 of the Act concerning corporations, Farnum's rights as a purchaser would seem to be absolute. The title to the chartered rights, privileges and franchise of the corporation passed to the purchaser who became entitled to hold, use and enjoy the same during the whole of the residue of the term limited in the charter of the said corporation in as full and ample a manner as such corporation could or might have used and enjoyed the same, subject, however, to all the restrictions, limitations and conditions contained in such charter. If this statute stood alone, Farnum might well claim that he acquired these franchises, although of a public

3—Lehigh Coal & Navigation Co v. Central R. R. Co., 34 N. J. Eq. 88 (1881).

1—McCarter v. Vineland Light & Power Co., 73 N. J. Eq. 703 (Court of Errors & Appeals, 1908).

nature as an individual with the right of perpetual succession, analogous to an indefeasible estate in fee simple of lands including not only *jus in re*, but *jus disponendi*; but in 1881 (P. L. 1881 p. 33) before Farnum's purchase at the receiver's sale, the Legislature, in exercising control of gas companies and others, modified the character and conditions of the title of purchasers of public franchises at a judicial sale. The state did not take away or abridge the rights and franchises acquired under the receiver's sale, but prescribed a mode of procedure whereby such rights and franchises, together with the right of perpetual succession, should be thereafter held and enjoyed. The Legislative intent seems to be clear to create a new corporation, and not to permit public franchises to pass to an individual to be used and enjoyed, sold and transferred, bequeathed and devised in the same manner as ordinary real or personal property. Accordingly, the Act of 1881 created a corporation in which the title to the franchises in question was *ipso facto* vested. The effect of this enactment is the same whether or not the purchaser exercised his right to organize 'the new corporation' already created by the election of directors and officers, and the issue of stock and the securing of bonds. The act effectually transferred the title and the right of perpetual succession to a corporation sole, and the purchaser, as an individual ceased to have any title which he could convey or lease in his lifetime or transmit by testamentary disposition.

* * * There is, we think, no room for argument or difference of opinion as to the meaning of the Act. The purchaser is constituted a body politic and corporate by the express language of the Act, and vested with all the property of the company and all its rights, powers, immunities, privileges and franchises. Under the act of 1881 there is no option to the purchaser to apply for a charter or not, as he pleases. There is no privilege conferred upon the purchaser to accept or reject at his will. The act itself confers the charter and creates the corporation, which comes into existence at the completion of the purchase. Whether the organization of the corporate body by election of directors and officers is required may be in question, but the legislative intent is unmistakable to prevent the anomaly of public franchises passing by assignment or devolution by operation of law or by last will and testament." 2

A company organized under the statute concerning the sale of property and franchises of certain corporations (P. L. 1897, p. 229) has conferred upon it all the corporate rights, liberties, privileges and franchises of such original or other company, and upon it rests the same burden and duty to maintain and operate a street railway under the statutes and the ordinances of the municipality as were imposed upon the original company.³

2—McCarter v. Vineland Light & Power Co., 73 N. J. Eq. 703 (Court of Errors & Appeals, 1908).

3—Bridgeton v. Traction Co., 62 N. J. L. 592 (1899).

The new corporation is bound by restrictions and conditions contained in a municipal ordinance granting location of tracks in the public streets, even though it did not expressly assume them.⁴

"The act of 1897 is constitutional. It has one general object, which is sufficiently expressed in its title. The object of the legislation is to provide for the sale of the property and franchises of the class of corporations designated by the act. All its provisions are directed to the common end of enabling creditors to secure the satisfaction of their claims by appropriating thereto the proceeds of the sale of the property and franchises of their debtor. While the act does not expressly declare that the new corporation shall have the right to take lands by eminent domain it provides that the corporation organized under it 'shall be entitled to all the rights, liberties, privileges and franchises of the corporation whose property and franchises have been so sold and conveyed.' The power to sell is not limited to part of the property or franchises. In aid of creditors the purchasers are to be invested with all the rights, liberties, privileges and franchises of the debtor corporation, none are excepted. The act should be liberally interpreted to secure that end. Upon the organization of the new corporation the property and franchises purchased by the purchaser at the sale for himself and his associates became vested in the new corporation by force and effect of the act of 1897." ⁵

Where a corporation was organized to take over the business and assets of another older corporation and contracted with the older corporation and its stockholders, in consideration of receiving such business and assets, to issue to each of the old stockholders certificates of stock in the new company, upon surrender of those in the old, share for share, a suit may be maintained by a holder of a certificate of stock in the old company against the new company for specific performance of this agreement. It is not necessary to make the old company, or any of its stockholders, parties defendant, nor to declare that the suit is brought for the benefit of such of the old stockholders as might come in and be made parties.⁶

4—*Asbury Park & S. G. Ry. Co. v. Neptune Township*, 73 N. J. Eq. 323 (1907); *Rutherford v. Hudson River Traction Co.*, 73 N. J. L. 227 (1906).

5—*Brinkerhoff v. Newark & Hackensack Traction Co.*, 66 N. J. L. 478 (1901).

6—*Fletcher v. Newark Telephone Co.*, 55 N. J. Eq. 47 (1896).

X. CONSOLIDATION.

109. POWER TO CONSOLIDATE.

Any two or more corporations organized or to be organized under any law or laws of this state for the purpose of carrying on any kind of business of the same or a similar nature may merge or consolidate into a single corporation, which may be either one of said merging or consolidating corporations, or a new corporation to be formed by means of such merger and consolidation; but the provisions of this act relative to merger and consolidation shall not apply to any railroad company, insurance company (except companies for the insurance or guaranty of the title to lands), banking companies, savings bank or other corporation intended to derive profit from the loan and use of money, turnpike company or canal company.¹

The power of corporations to consolidate and merge, is not to be implied, and exists only by virtue of plain legislative enactment. It follows that there is no right to consolidate without the unanimous consent of stockholders unless the power to consolidate has been conferred by legislation that may be read into the contract of incorporation. Under both the act of March 8th, 1893, P. L. p. 121, and the General Corporation Act (Sec. 104), the power to merge two corporations is conferred only where they are organized for the purpose of carrying on business of the same or a similar nature.²

In the Colgate case the court held upon an examination of the respective certificates of incorporation of the United States Leather Company and of the Central Leather Company, that these two corporations were not organized for the purpose of carrying on business of "the same or a similar nature" within the meaning of the act of March 8, 1893, P. L. page 121, and that the proposed consolidation of the two companies was unauthorized by law and violative of the rights of nonassenting stockholders.

A de facto consolidation of two railroad companies having been effected by the filing of a certificate in the secretary of state's office, pursuant to the statute, and an organization of the new company thereunder having been made, and considerable money expended in the construction of the railroads included in the consolidation, it was held that the holder of income bonds of one of the companies could not have an information in the nature of a quo warranto to determine the validity of the consolidation.³

1—Corporation Act, § 104. As to railroad companies, see Part II of this book.

2—Colgate v. United States Leather Co., 72 Atl. 126 (Court of Errors & Appeals, 1909).

3—Terhune v. Potts, 47 N. J. L. 218 (1885).

110. PROCEEDINGS FOR CONSOLIDATION.

The statutory proceedings for consolidation are prescribed by section 105 of the general corporation act as follows: The consolidation or merger shall be made under the conditions, provisions, restrictions, and with the powers hereinafter mentioned:

1. The directors of the several corporations proposing to merge or consolidate may enter into a joint agreement under the corporate seals of the respective corporations, for the merger or consolidation of said corporations and prescribing:

The terms and conditions thereof.

The mode of carrying the same into effect.

The name of the new corporation (if one shall be so formed or created), or of the consolidated corporation, as the case may be.

The number, names and places of residence of the first directors and officers of such new or consolidated corporation (who shall hold their offices until their successors be chosen or appointed, either according to law or according to the by-laws of the said corporation).

The number of shares of the capital stock, whether common or preferred, and the amount or par value of each share of such new or consolidated corporation; and

The manner of converting the capital stock of each of said merging or consolidating corporations into the stock or obligations of such new or consolidated corporation.

And in case of the creation of a new corporation, how and when the directors and officers shall be chosen or appointed;

Together with all such other provisions and details as such first-mentioned directors shall deem necessary to perfect the merger consolidation of said corporation.

The agreement shall be submitted to the stockholders of each of said merging or consolidating corporations, separately, at a meeting thereof, to be called for the purpose of taking the same into consideration; and twenty days' notice of the time, place and object of such meeting shall be mailed to the last known post-office address of each of such stockholders; and at the said meetings of stockholders the said agreement of such directors shall be considered, and a vote of the stockholders of each corporation by ballot shall be taken separately, for the adoption or rejection of the same, each share of stock entitling the holder thereof to one vote, and said ballots shall be cast in person or by proxy; and if the votes of the holders of two-thirds of all the capital stock of each of the said merging or consolidating corporations shall be for the adoption of said agreement that fact shall be certified thereon by the secretary of each of the respective corporations, under the seal thereof, and the agreement, so adopted and so certified, shall be filed in the office of the secretary of state, and shall from thence be deemed and taken to be the agreement and act of merger or consolidation of the said corporations, and a copy of said agreement and act of merger or consolida-

tion, duly certified by the secretary of state under the seal thereof, shall be evidence of the existence of such new or consolidated corporation.

111. RIGHTS AND REMEDIES OF DISSENTING STOCKHOLDERS.

After the filing of a consolidation contract between certain corporations, the business previously transacted by the constituent companies was carried on by the merged corporation as an entirety and a large amount of the property received by the merged corporation had been sold, exchanged or converted into other forms, and the receipts therefor had been so commingled that it had become impossible to identify the same or to separate the business of the constituent corporations. Complainant, a stockholder in one of such corporations, made no objection to the merger until nearly six months after the merger agreement during which time the consolidated corporation's securities had been put on the market and were largely dealt in. It also appeared that complainant's assignor, who was the administrator of the record holder of the stock, had received notice of the meeting at which the merger agreement was entered into, and complainant when he acquired the stock had actual notice thereof and bought the stock for the purpose of suing to set aside the consolidation. It was held that the complainant was not entitled to a decree vacating such merger agreement and requiring the officers of his corporation to resume possession of its assets and continue to transact its business.¹

Where a consolidation agreement was made by several companies in September and complainant, a stockholder in one of the constituent companies had full notice thereof as early as the following November, and had investigated and fully resolved to dissent therefrom as early as January following when he addressed a written protest to the President and directors of his company, and within two weeks he was notified that his protest would be disregarded, and did not file his bill to avoid the merger until March 20th, the securities of the consolidated company in the meantime having been daily changing hands in the open market, and the actual business of the company having been carried on in such a manner as to render a separation of the consolidated company into its constituent elements increasingly difficult; it was held that complainant was guilty of laches precluding relief.²

As to public utility corporations, the Corporation Act (§ 108) provides as follows:

If any of the corporations so authorized to merge or consolidate shall have the right to exercise any franchise, for public use, and any stockholder thereof not voting in favor of such agreement shall dissent therefrom and shall refuse or neglect to convert his stock into the stock of such consolidated corporation, or to dispose thereof in the manner and on the terms specified in such agreement, such dis-

1—*Belting v. American Tobacco Co.*, 72 N. J. Eq. 32 (1907).

2—*Dana v. American Tobacco Co.*, 73 N. J. Eq. 736 (Court of Errors & Appeals, 1907).

senting stockholder or such consolidated corporation may, at any time within thirty days after the adoption and filing of the agreement of consolidation, apply by petition to the circuit court of the county in which the chief office of the corporation whose stockholders shall so dissent or neglect, was or is located, on reasonable notice to be prescribed by said court to said consolidated corporation, or to such dissenting stockholder, as the case may be, for the appointment of three disinterested appraisers to appraise the full market value of his stock, without regard to any depreciation or appreciation thereof in consequence of the said merger or consolidation, and whose award (or that of a majority of them), when confirmed by the said court, shall be final and conclusive on all parties, and said consolidated corporation shall pay to such stockholder the value of his stock as aforesaid; and on receiving such payment, or on a tender thereof, or in case of any legal disability or absence from the state, on the payment of such award into said court, said stockholder shall transfer his stock to the said consolidated corporation to be disposed of by the directors thereof, or to be retained for the benefit of the remaining stockholders; and in case the said award is not so paid within thirty days from the filing of said award and confirmation by said court, and notice thereof to be given in the manner aforesaid unto said stockholder or said consolidated corporation, the amount of the award shall be a judgment against said corporation, and may be collected as other judgments in said court are by law collectible.

As to other corporations, a later statute (P. L. 1902, p. 700) provides as follows:

1. Upon the merger or consolidation of any two or more corporations, which do not have the right to exercise any franchise for public use, into a single corporation, as provided by the act to which this act is a supplement, if any stockholder in any of said merging or consolidating corporations not voting in favor of such agreement of merger or consolidation, shall dissent therefrom and shall refuse or neglect to convert his stock into the stock of such consolidated corporation, or to dispose thereof in the manner and on the terms specified in such agreement, such dissenting stockholder may, at any time within thirty days after the adoption and filing of the agreement of consolidation, apply by petition to the circuit court of the county in which the chief office of the corporation, whose stockholder shall so dissent or neglect, was or is located, on reasonable notice to be prescribed by said court to said consolidated corporation for the appointment of three disinterested appraisers to appraise the full market value of his stock without regard to any depreciation or appreciation thereof in consequence of the said merger or consolidation; and thereafter the proceedings and the rights and remedies of the respective parties shall be the same as is provided in the act to which this act is a supplement in this case of the appointment of appraisers to appraise the market value of stock of dissenting stockholders of corporations:

enjoying the right to exercise any franchise for public use; and the judgment upon the award as provided for therein, shall be a judgment against said consolidated corporation, and shall be a lien on all the property and assets acquired by the consolidated corporation from the corporation so merged, subject only to such liens as existed against said property and assets at the time of such merger or consolidation.

2. Nothing herein shall in anywise limit, repeal or supersede the provisions of the one hundred and eighth section of the act to which this is a supplement.

112. STATUS OF ORIGINAL AND CONSOLIDATED CORPORATIONS AND EFFECT OF CONSOLIDATION IN GENERAL.

Upon the consummation of said act of merger or consolidation, all and singular, the rights, privileges, powers and franchises of each of said corporations, and all property, real, personal and mixed, and all debts due on whatever account, as well for stock subscriptions as all other things in action or belonging to each of such corporations, shall be vested in the consolidated corporation; and all property, rights, privileges, powers and franchises, and all and every other interest shall be thereafter as effectually the property of the consolidated corporation as they were of the several and respective former corporations, and the title to any real estate, whether by deed or otherwise, under the laws of this state, vested in either of such corporations, shall not revert or be in any way impaired by reason of this act; provided, that all rights of creditors and all liens upon the property of either of said former corporations shall be preserved unimpaired, and the respective former corporations may be deemed to continue in existence, in order to preserve the same; and all debts, liabilities and duties of either of said former corporations shall thenceforth attach to said consolidated corporation, and may be enforced against it to the same extent as if said debts, liabilities and duties had been incurred or contracted by it.¹

Upon making and perfecting the said agreement and act of merger or consolidation, and filing the same in the office of the secretary of state, the several corporations shall be one corporation, by the name provided in said agreement (in case a new corporation shall be created thereby), or by the name of the consolidated corporation into which said other contracting corporation or corporations shall be so merged or consolidated, as the case may be, and possessing all the rights, privileges, powers and franchises, as well of a public as of private nature, and being subject to all the restrictions, disabilities and duties of each of such corporations so merged or consolidated, except as altered by the provisions of this act.²

The consolidation of the property and franchises of different companies by their own act does not enlarge the franchises, powers or

1—Corporation Act, § 107.

2—Corporation Act, § 106.

privileges of the original companies. The new company takes the rights and franchises it acquires by the consolidation, subject to the original conditions and limitations.³

The words "franchises, privileges and immunities," in a statute creating a corporation by the consolidation of two existing corporations, are sufficient to grant to the new corporation an exemption from taxation contained in the charters of the other companies.⁴

When two or more corporations are merged or consolidated the consolidated corporation shall have power and authority to issue bonds or other obligations, negotiable or otherwise, and with or without coupons or interest certificates thereto attached, to an amount sufficient with its capital stock to provide for all the payments it will be required to make or obligations it will be required to assume, in order to effect such merger or consolidation; to secure the payment of which bonds or obligations it shall be lawful to mortgage its corporate franchises, rights, privileges and property, real, personal and mixed; provided, such bonds shall not bear a greater rate of interest than six per centum per annum; the consolidated corporation may purchase, acquire, hold and dispose of the stocks of other corporations of this state or elsewhere, and exercise in respect thereto all the powers of stockholders thereof, and may issue capital stock, either common or preferred, or both, to such an amount as may be necessary, to the stockholders of such merging or consolidating corporations in exchange or payment for their original shares, in the manner and on the terms specified in the agreement of merger or consolidation; which may fix the amount and provide for the issue of preferred stock based on the property or stock of the merging or consolidating corporations conveyed to the consolidated corporation, as well as upon money capital paid in.⁵

In *Strickland v. National Salt Co.*, 76 Atl. 1048 (1910), it was held that where a consolidation agreement provided for the issue of stock in payment of stock of one of the constituent companies at a fictitious valuation, it was invalid, and that no agreement relating thereto could be enforced.

3—*Traction Company v. Elizabeth*, 58 N. J. L. 619 (1896).

4—*Cook v. State*, 33 N. J. L. 474 (1868); *State Board of Assessors v. Morris & Essex R. R. Co.*, 49 N. J. L. 193 (Court of Errors & Appeals, 1886).

5—*Corporation Act*, § 109.

XI. DISSOLUTION AND FORFEITURE OF FRANCHISE.

113. THE POWER TO FORFEIT CORPORATE CHARTERS AND FRANCHISES; GROUNDS OF FORFEITURE.

The Corporation Act provides (§ 4) that the charter of every corporation, or any supplement thereto or amendment thereof, shall be subject to alteration, suspension and repeal, in the discretion of the legislature, and the legislature may at pleasure dissolve any corporation.

The power to declare a forfeiture of franchises is exclusively in the government, by proceedings directly for that purpose. A forfeiture cannot be taken advantage of or enforced collaterally or incidentally, or in any other mode than by a direct proceeding. The government creating the corporation can alone institute such a proceeding. And it may waive the broken compact made with it.¹

The grounds for forfeiting the charter of a corporation are:

- (a) Non-user of franchise.
- (b) Misuser of franchise or powers.
- (c) Exercise of franchise or power not granted by law.
- (d) Violation of charter or statute.

A corporation may exist without exercising its corporate rights; and the mere omission of a corporation to exercise some of its rights and powers is no cause of forfeiture of its charter, much less will such an omission work the dissolution of a corporation.²

114. PROCEDURE FOR THE FORFEITURE OF CORPORATE FRANCHISE.

When the proceeding is against certain individuals for claiming to act as a corporation, and its object is to try the legality of the charter and to determine the corporate existence of a corporation, it can be instituted only by the attorney general as the representative of the state, and in behalf of the state. For that purpose a private relator cannot have the use of the writ of *quo warranto*.¹

Nobody can take advantage of the breach of the condition on which a corporation is created, for the purpose of depriving it of its franchises, except the sovereign power which created the corporation. A court of equity has no authority, in virtue of its general jurisdiction, to dissolve a corporation and deprive it of its franchises for either non-user or misuser of its corporate powers, nor because its organiza-

1—New Jersey Southern R. R. Co. v. Long Branch Commissioners, 39 N. J. L. 28 (1876).

2—Society for Establishing Useful Manufactures v. Morris Canal & Banking Co., 30 N. J. Eq. 145, 152 (Footnote).

1—Terhune v. Potts, 47 N. J. L. 218 (1885).

tion was not effected in accordance with the requirements of the law by which it was created, but in violation of them. An inquiry whether a corporation exists *de jure* or not is beyond the power of a court of chancery. Whenever it is sought to impugn the legality of a corporation which exists under the forms of law, the remedy is by *quo warranto*, or information in the nature thereof, instituted by the attorney-general.²

In *Rex v. Passmore*, 3 T. R. 244, Ashhurst, J., thus broadly lays down the doctrine: "A *scire facias* is the proper mode of proceeding against a legally existing body, for an abuse of power, or where delinquency is imputed to them. But a *quo warranto*, when there is a body *de facto*, but from defect in their constitution, they cannot legally exercise the power they affect to use. So, a *quo warranto* is in the nature of a writ of right for the king, against him who usurps or claims a franchise or liberty to say by what authority he claims it. (2 Inst. 282.) The defendants are a legally constituted body, and the complaint against them is not for a usurpation of a franchise, but for not exercising one in a proper manner, and the appropriate and usual remedy would be by *scire facias* for a forfeiture, or by indictment for the nuisance. But, in addition to these remedies, a *quo warranto* is sometimes resorted to, in order to obtain a judgment of forfeiture."³

An information in nature of *quo warranto* against a corporation must be prosecuted in the name of the attorney-general alone and cannot be joined with an information at the instance of private relators against officers in a corporation. This information by the attorney-general is the successor of the ancient original writ of *quo warranto* called the king's writ for franchises and liberties, which has become obsolete.⁴

The old writ of *quo warranto* was a civil writ at the suit of the king, and not a criminal prosecution at all.⁵

When facts exist which, in the opinion of the attorney-general, call for a *quo warranto* information, he has the right to present it, without leave asked of anyone. In that respect he represents the sovereignty, whose attorney he is. Such a power existed unquestionably at common law, and neither the statute of 9 Anne, nor our own statute, in any way abridged it. Before 9 Anne, *quo warranto* informations were filed either by the attorney or solicitor-general *ex officio*, or by an officer of the court under the protection of the court, at the

2—*Elizabethtown Gas Light Co. v. Green*, 46 N. J. Eq. 118 (1889); affirmed 49 N. J. Eq. 329 (Court of Errors & Appeals, 1892); see also *Society for Establishing Useful Manufactures v. Morris Canal Co.*, 1 N. J. Eq. 157 (1830); *Attorney General v. Stevens*, 1 N. J. Eq. 369 (1831); *Jersey City Gas Light Co. v. Consumers' Gas Co.*, 40 N. J. Eq. 427 (1885).

3—Quoted by Randolph, J., in *The State v. The Paterson & Hamburg Turnpike Co.*, 21 N. J. L. 9 (1847).

4—*Gibbs v. Somers Point*, 49 N. J. L. 515 (1887).

5—*Kirkpatrick, C. J.*, in *The State v. Jabez Parkhurst*, 9 N. J. 439 (1802).

instance of parties concerned. Such officer, in the King's Bench, was the master of the crown office. The statute of 9 Anne merely regulated the practice in some cases of this latter class, requiring the parties concerned to be named as relators and to become responsible for costs, etc. Our statute substitutes the attorney-general for this master of the crown office and extends the range of the act; but in such case the attorney-general is only nominally a party—a mere officer of the court—subject to its control; he is not there as attorney-general, exercising in the cause that power which such officer had at common law, and which he still wields when he appears *ex officio*.⁶

"Our act is copied substantially from the statute of 9 Anne c. 20. The English statute provides for the case when any persons shall usurp, etc., any corporation office or franchise; the language of our statute is more extensive, and applies to the intrusion into, or unlawful holding of any office or franchise within this state. In regard to the present question, we apprehend the same construction applies to both statutes. An information for the purpose of dissolving a corporation, or seizing its franchises, cannot be prosecuted in the name of the state, at the relation of private persons, though leave be asked of the court. Such proceeding can be instituted only by the attorney general on the part of the state, either merely *ex officio*, or under special direction from the proper authority. The statute of 9 Anne extends only to individuals usurping offices or franchises in a corporation, and not to the corporation as a body. This distinction is well settled, and is a safe and proper rule. The state, said C. J. Parsons in a case cited, may waive any breaches of any condition express or implied, on which the corporation was created; and the court cannot (or ought not) to give judgment for the seizure of the franchises of any corporation unless the state itself be a party in interest in the suit, and thus assents to the judgment."⁷

"In New Jersey, however, for over thirty years past, the practice, upon informations filed under our statute (which, except as to the franchises and offices to which it is applicable, corresponds with 9 Anne), has been quite uniform and different from that in the King's Bench. In *State v. Thompson*, A. D. 1843, Spen. 689; *State v. Vreeland*, A. D. 1846; *State v. Gummersall*, A. D. 1854, 4 Zab. 529; *State v. Roe*, A. D. 1856, 2 Dutcher, 215, and *State v. Pritchard*, A. D. 1872, 7 Vroom. 101, which were all under the statute; upon filing the information, a rule was entered that process do issue, and that the defendants plea to the information within such time as the court allowed; in none of these cases, however, was any process issued, but the rule to plead, with a copy of the information being served, the defendants put in their response. This practice, so long and steadily continued, may

6—*Attorney General v. Delaware & Bound Brook R. R. Co.*, 38 N. J. L. 282 (1876).

7—*The State v. The Paterson & Hamburg Turnpike Co.*, 21 N. J. L. 9 (1847).

now be regarded as the proper method of procedure in like cases. The information being filed only after leave of the court granted, and such leave not being given until the defendant has had notice, either from the attorney of the relator or by a rule to show cause, defendants have, by it, ample opportunity for defence. So much of the rule as directs that process issue, may well be dispensed with as useless.

"In the case before us, however, the information was not filed under the statute. No leave of the court for its filing was asked, and no notice that it would be filed was given to the defendants. In such cases the practice has not been the same. In the case of *The State v. The Associates of the Jersey Company*, A. D. 1849, which was of this sort, on filing the information a summons was issued, returnable to the following terms, served upon the secretary of the company; and upon its return a rule was taken on the defendants to plead in thirty days. That precedent may well be followed, modified only by our change of time as to return of process. The summons may be returnable in vacation, and may be served in the mode in which summons can be served in ordinary actions, and upon its return a rule to plead may be allowed by the court or a justice. The summons, as served in this case, may stand as valid, and the Attorney General may take a rule that the defendants plead within thirty days."⁸

In the case of an information in the nature of a *quo warranto* filed by the attorney general drawing in question the legality of the organization of a corporation, such *de facto* corporation is the proper defendant.⁹

If, on a demurrer in *quo warranto* proceedings, any count of the information legally states matter capable of supporting the action and there is no plea legally stating a sufficient answer thereto, the defendant cannot be acquitted.¹⁰

On the expiration of the charter of a corporation, the corporate existence is continued by section 53 of the General Corporation act, for the purposes therein mentioned, and consequently upon a determination in *quo warranto* proceedings that the charter of a corporation has expired, a judgment ousting a corporation from enjoying the franchise of corporate existence should not be rendered. The judgment should be that the corporate existence of said company has terminated except so far as it is continued by the said section, and that the company be ousted from the exercise and enjoyment of all franchises except as are thereby conferred.¹¹

8—Attorney General v. Delaware & Bound Brook R. R. Co., 38 N. J. L. 282 (1876).

9—State v. Atlantic Highlands, 50 N. J. L. 457 (1888).

10—Grey, Attorney General v. Newark Plank Rd. Co., 65 N. J. L. 603 (Court of Errors & Appeals, 1901).

11—Gray, Attorney General v. Newark Plank Road Co., 65 N. J. L. 603 (Court of Errors & Appeals, 1901).

115. SURRENDER OF FRANCHISE AND VOLUNTARY DISSOLUTION.

Without statutory authority shareholders in a corporation cannot extinguish its charter or dissolve it, and a court of equity is without power to accomplish a similar result at their instance. In the absence of statutory provisions, the franchises can be declared forfeited and extinguished only at the suit of the state, in an appropriate proceeding at law.¹

The incorporators named in any certificate of incorporation, before the payment of any part of the capital, and before beginning the business for which the corporation was created, may surrender all their corporate rights and franchises, by filing in the office of the secretary of state a certificate, verified by oath, that no part of the capital has been paid and such business has not been begun, and surrendering all rights and franchises, and thereupon the said corporation shall be dissolved.²

Whenever, in the judgment of the board of directors, it shall be deemed advisable and most for the benefit of such corporation that it should be dissolved, the board, within ten days after the adoption of a resolution to that effect by a majority of the whole board at any meeting called for that purpose, of which meeting every director shall have received at least three days' notice, shall cause notice of the adoption of such resolution to be mailed to each stockholder residing in the United States, and also beginning within said ten days cause a like notice to be published in a newspaper published in the county wherein the corporation shall have its principal office, at least four weeks successively, once a week, next preceding the time appointed for the same, of a meeting of the stockholders to be held at the office of the corporation, to take action upon the resolutions so adopted by the board of directors, which meeting shall be held between the hours of ten o'clock in the forenoon and three o'clock in the afternoon of the day so named, and which meeting may, on the day so appointed, by consent of a majority in interest of the stockholders present, be adjourned from time to time for not less than eight days at any one time, of which adjourned meeting notice by advertisement in said newspaper shall be given; and if at any such meeting two-thirds in interest of all the stockholders shall consent that a dissolution shall take place and signify their consent in writing, such consent, together with a list of the names and residences of the directors and officers, certified by the president and the secretary or treasurer, shall be filed in the office of the secretary of state, who, upon being satisfied by due proof that the requirements aforesaid have been complied with, shall issue a certificate that such consent has been filed, and the board of directors shall cause such certificate to be published four weeks successively, at least once a week, in a newspaper published in said county; and upon the filing in the

1—*Benedict v. Columbus Construction Co.*, 49 N. J. Eq. 23 (1891).

2—*Corporation Act*, § 32.

office of the secretary of state of an affidavit that said certificate has been so published, the corporation shall be dissolved and the board shall proceed to settle up and adjust its business and affairs; whenever all the stockholders shall consent in writing to a dissolution, no meeting or notice thereof shall be necessary, but on filing said consent in the office of the secretary of state he shall forthwith issue a certificate of dissolution, which shall be published as above provided.³

Where a corporation has ceased to do business, and apparently nothing remains to be done but to pay its debts and divide its surplus among the stockholders, it is the duty of the directors, under the statute, to call a stockholders' meeting.⁴

The proceedings provided by the statute for such voluntary dissolution take the place of one of the common law methods of surrendering corporate franchises, and the acts required of the state and corporation officers were intended to and do amount to a tender to and acceptance of such surrender by the sovereign power. But while this section declares what proceedings shall be taken to effect the dissolution, section 53 provides that such dissolved corporation shall be continued a body corporate for the purpose of prosecuting and defending suits, and of enabling it to settle up and close its affairs and dispose of and convey its property and to divide its capital, and section 54 provides that upon dissolution in any manner the directors in office at the time of the dissolution shall be trustees of such corporation, with full power to settle the affairs, collect the debts, dispose of the property and to divide the assets after payment of its debts. The directors so constituted trustees (Corporation Act, § 55), may recover the debts and property in the name of the corporation, and they shall be suable either by the corporate name or in their own name for the corporate debts, and they are jointly and severally responsible for the debts to the amount of assets which shall come to their hands.

The proceeding prosecuted for the voluntary dissolution of corporations is wholly statutory, and, unless strictly followed, serious results may ensue. The various steps are plain and simple. "In my view this court cannot avoid or evade the plain words of section 31, which provide as above stated, that upon filing the affidavit that the certificate of the secretary of state has been published as required by law, the corporation shall be dissolved, and I do not think that a corporation is dissolved until that final step shall have been taken, and this, I think, is the practicable interpretation that has been given to the statute, by the bar and by the courts."⁵

Hereafter no corporation organized under any law of this state shall be dissolved by its stockholders until all taxes levied upon or assessed against such corporation by the state of New Jersey in accordance with the provisions of an act entitled "An act to provide for the im-

3—Corporation Act, § 31.

4—*Streit v. Citizens Fire Ins. Co.*, 29 N. J. Eq. 21 (1878).

5—*Hegeman v. Atlantic Rubber Shoe Co.*, 73 N. J. Eq. 295 (1907).

position of state taxes upon certain corporations and for the collection thereof," approved April eighteenth, one thousand eight hundred and eighty-four, and all acts amendatory thereof or supplementary thereto, shall have been fully paid, and a certificate to that effect, signed by the comptroller of the treasury, shall have been annexed to and filed with the certificate of dissolution.⁶

The rule allowing stockholders to avoid contracts made with another corporation by common directors, applicable where the contract is made through the directors alone, is inapplicable to the action of the directors in statutory dissolution proceedings.⁷

116. CONTINUANCE OF CORPORATE EXISTENCE AFTER DISSOLUTION.

All corporations, whether they expire by their own limitation or be annulled by the legislature or otherwise dissolved, shall be continued bodies corporate for the purpose of prosecuting and defending suits by or against them, and of enabling them to settle and close their affairs, to dispose of and convey their property and to divide their capital, but not for the purpose of continuing the business for which they were established.¹

117. MODE OF WINDING UP DISSOLVED CORPORATION; DIRECTORS AS TRUSTEES; APPOINTMENT OF RECEIVER; POWERS, DUTIES AND LIABILITIES OF DIRECTORS AND RECEIVER.

Upon the dissolution in any manner of any corporation the directors shall be trustees thereof, with full power to settle the affairs, collect the outstanding debts, sell and convey the property and divide the moneys and other property among the stockholders, after paying its debts, as far as such moneys and property shall enable them; they shall have power to meet and act under the by-laws of the corporation and, under regulations to be made by a majority of said trustees, to prescribe the terms and conditions of the sale of such property, and may sell all or any part for cash, or partly on credit, or take mortgages and bonds for part of the purchase price for all or any part of said property.¹

The directors, constituted trustees as aforesaid, shall have authority to sue for and recover the aforesaid debts and property, by the name of the corporation, and shall be suable by the same name, or in their own names or individual capacities, for the debts owing by such corporation, and shall be jointly and severally responsible for such debts, to the amount of the moneys and property of the corporation which shall come to their hands or possession as such trustees.²

6—P. L. 1900, p. 316.

7—*Bijur v. Standard Distilling & Distributing Co.*, 74 N. J. Eq. 546 (1908).

1—Corporation Act, § 53.

1—Corporation Act, § 54.

2—Corporation Act, § 55.

When any corporation shall be dissolved in any manner whatever, the court of chancery, on application of any creditor or stockholders at any time, may either continue the directors trustees as aforesaid, or appoint one or more persons to be receivers of such corporation, to take charge of the estate and effects thereof, and to collect the debts and property due and belonging to the corporation, with power to prosecute and defend, in the name of the corporation or otherwise, all suits necessary or proper for the purposes aforesaid, and to appoint an agent or agents under them, and to do all other acts which might be done by such corporation, if in being, that may be necessary for the final settlement of its unfinished business; and the powers of such trustees or receivers may be continued as long as the court shall think necessary for such purposes.³

The court of chancery shall have jurisdiction of said application and of all questions arising in the proceedings thereon, and may make such orders and decrees therein as justice and equity shall require.⁴

The said trustees or receivers shall pay ratably, as far as its moneys and property shall enable them, all the creditors of a corporation who prove their debts in the manner directed by the court; and if any balance remain after the payment of such debts and necessary expenses, the same shall be distributed among the stockholders.⁵

Any action, now pending or to be hereafter begun, against any corporation which may become dissolved before final judgment shall not abate by reason thereof, but no judgment shall be entered therein except upon notice to the trustees or receivers of the corporation.⁶

A copy of every decree or judgment dissolving a corporation or forfeiting its charter shall be forthwith filed by the clerk of the court in the office of the secretary of state, and a note thereof shall be made by the secretary of state on the charter or certificate of incorporation, and in the index thereof, and be published by him in the annual volume of laws.⁷

The Court of Chancery cannot intervene under the authority given to it by section 56 of the Corporation Act until the affidavit that the Certificate of the Secretary of State has been published and has been filed as required by section 31 of the act.⁸

A receiver of a corporation will not be appointed under sections 56 and 57 of the Corporation Act, where it appears that the corporation is being dissolved by the stockholders in accordance with the provisions of section 31 of the act, and that the bill was filed eleven days after the stockholders meeting held for that purpose, but before the stockholders' consent and statutory certificate had been filed in the office

3—Corporation Act, § 56.

4—Corporation Act, § 57.

5—Corporation Act, § 58.

6—Corporation Act, § 59.

7—Corporation Act, § 60.

8—Hegeman v. Atlantic Rubber Shoe Co., 73 N. J. Eq. 295 (1907).

of the Secretary of State, there being no allegation of the insolvency of the corporation or maladministration on the part of its directors.⁹

The power of the chancellor to interpose and take from the directors the power to close up the business of the corporation and to put its affairs in the hands of a receiver, is a discretionary power to be exercised only on good cause shown, upon circumstances disclosed by the proofs which show the need of the interference of the court for the protection of creditors or stockholders from breaches of trust by the directors in the performance of their duties.¹⁰

9—Hegeman v. Atlantic Rubber Shoe Co., 73 N. J. Eq. 295 (1907).

10—Newfoundland Railroad Construction Co. v. Schack, 40 N. J. Eq. 222 (Court of Errors & Appeals, 1885).

XII. FOREIGN CORPORATIONS.

118. THE STATUS OF A FOREIGN CORPORATION.

In the case of *Bank of Augusta v. Earle* (13 Pet. 519 [1839]), Chief Justice Taney thus defined the status of a corporation organized under the laws of one state when extending its operations to another state:

"But it has been urged in the argument, that notwithstanding the powers thus conferred by the terms of the charter, a corporation, from the very nature of its being, can have no authority to contract out of the limits of the state; that the laws of a state can have no extra-territorial operation; and that as a corporation is the mere creature of a law of the state, it can have no existence beyond the limits in which that law operates; and that it must necessarily be incapable of making a contract in another place.

"It is very true that a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law, and by force of the law; and where that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty. But although it must live and have its being in that state only, yet it does not by any means follow that its existence there will not be recognized in other places; and its residence in one state creates no insuperable objection to its power of contracting in another. It is indeed a mere artificial being, invisible and intangible; yet it is a person, for certain purposes in contemplation of law, and has been recognized as such by the decisions of this Court. It was so held in the case of *The United States v. Amedy*, 11 Wheat. 412, and in *Beaston v. The Farmer's Bank of Delaware*, 12 Peters 135. Now, natural persons through the intervention of agents, are continually making contracts in countries in which they do not reside; and where they are not personally present when the contract is made; and nobody has ever doubted the validity of these agreements. And what greater objection can there be to the capacity of an artificial person, by its agents, to make a contract within the scope of its limited powers, in a sovereignty in which it does not reside; provided such contracts are permitted to be made by them by the laws of the place?

"The corporation must no doubt show, that the law of its creation gave it authority to make such contracts, through such agents. Yet, as in the case of a natural person, it is not necessary that it should actually exist in the sovereignty in which the contract is made. It is sufficient that its existence as an artificial person, in the state of its creation, is acknowledged and recognized by the law of the nation where the dealing takes place; and that it is permitted by the laws of that place to exercise there the powers with which it is endowed.

"Every power, however, of the description of which we are speaking, which a corporation exercises in another state, depends for its validity upon the laws of the sovereignty in which it is exercised; and a corporation can make no valid contract without their sanction, express or implied. And this brings us to the question which has been so elaborately discussed; whether, by the comity of nations and between these states, the corporations of one state are permitted to make contracts in another. It is needless to enumerate here the instances in which, by the general practice of civilized countries, the laws of the one, will, by the comity of nations, be recognized and executed in another, where the right of individuals are concerned. The cases of contracts made in a foreign country are familiar examples; the Courts of justice have always expounded and executed them, according to the laws of the place in which they were made; provided that law was not repugnant to the laws or policy of their own country. The comity thus extended to other nations is no impeachment of sovereignty. It is the voluntary act of the nation by which it is offered; and is inadmissible when contrary to its policy, or prejudicial to its interests. But it contributes so largely to promote justice between individuals, and to produce a friendly intercourse between the sovereignties to which they belong; that Courts of justice have continually acted upon it, as a part of the voluntary law of nations. It is truly said, in Story's Conflict of Laws, 37, that 'In the silence of any positive rule, affirming, or denying, or restraining the operation of foreign laws, Courts of justice presume the tacit adoption of them by their own government; unless they are repugnant to its policy, or prejudicial to its interests. It is not the comity of the Courts, but the comity of the nation which is administered, and ascertained in the same way, and guided by the same reasoning by which all other principles or municipal law are ascertained and guided.'

"Adopting, as we do, the principle here stated, we proceed to inquire whether, by the comity of nations, foreign corporations are permitted to make contracts within their jurisdiction; and we can perceive no sufficient reason for excluding them, when they are not contrary to the known policy of the state, or injurious to its interests. It is nothing more than the admission of the existence of an artificial person created by the law of another state, and clothed with the power of making certain contracts. It is but the usual comity of recognizing the law of another state. In England, from which we have received our general principles of jurisprudence, no doubt appears to have been entertained of the right of a foreign corporation to sue in its Courts; since the case of *Henriquez v. The Dutch West India Company*, decided in 1729, 2 L. Raymond, 1532. And it is a matter of history, which this Court are bound to notice, that corporations, created in this country, have been in the open practice for many years past, of making contracts in England of various kinds, and to very large amounts; and we have never seen a doubt suggested there of the validity of these contracts,

by any Court or any jurist. It is impossible to imagine that any Court in the United States would refuse to execute a contract by which an American corporation had borrowed money in England; yet if the contracts of corporations made out of the state by which they were created, are void, even contracts of that description could not be enforced.

"It has, however, been supposed that the rules of comity between foreign nations do not apply to the states of this Union; that they extend to one another no other rights than those which are given by the Constitution of the United States; and that the Courts of the general government are not at liberty to presume, in the absence of all legislation on the subject, that a state has adopted the comity of nations towards the other states, as a part of its jurisprudence; or that it acknowledges any rights but those which are secured by the Constitution of the United States. The Court think otherwise. The intimate union of these states, as members of the same great political family; the deep and vital interests which bind them so closely together; should lead us, in the absence of proof to the contrary, to presume a greater degree of comity, and friendship, and kindness towards one another, than we should be authorized to presume between foreign nations. And when (as without doubt must occasionally happen) the interest or policy of any state requires it to restrict the rule, it has but to declare its will, and the legal presumption is at once at an end. But until this is done, upon what grounds could this Court refuse to administer the law of international comity between these states? They are sovereign states; and the history of the past, and the events which are daily occurring furnish the strongest evidence that they have adopted towards each other the laws of comity in their fullest extent. Money is frequently borrowed in one state, by a corporation created in another. The numerous banks established by different states are in the constant habit of contracting and dealing with one another. Agencies for corporations engaged in the business of insurance and of banking have been established in other states, and suffered to make contracts without any objection on the part of the state authorities. These usages of commerce and trade have been so general and public, and have been practised for so long a period of time, and so generally acquiesced in by the states, that the Court cannot overlook them when a question like the one before us is under consideration. The silence of the state authorities, while these events are passing before them, show their assent to the ordinary laws of comity which permit a corporation to make contracts in another state. But we are not left to infer it merely from the general usages of trade, and the silent acquiescence of the states. It appears from the cases cited in the argument, which it is unnecessary to recapitulate in this opinion; that it has been decided in many of the state Courts, we believe in all of them where the question has arisen, that a corporation of one state may sue in the Courts of another. If it may sue, why may it not make a contract? The right to sue is one of the powers which it derives from its charter. If the

Courts of another country take notice of its existence as a corporation, so far as to allow it to maintain a suit, and permit it to exercise that power; why should not its existence be recognized for other purposes, and the corporation permitted to exercise another power which is given to it by the same law and the same sovereignty—where the last mentioned power does not come in conflict with the interest or policy of the state? There is certainly nothing in the nature and character of a corporation which could justly lead to such a distinction; and which should extend to it the comity of suit, and refuse to it the comity of contract. If it is allowed to sue, it would of course be permitted to compromise, if it thought proper, with its debtor; to give him time; to accept something else in satisfaction; to give him a release; and to employ an attorney for itself to conduct its suit. These are all matters of contract, and yet are so intimately connected with the right to sue, that the latter could not be effectually exercised if the former were denied. * * *

“But it cannot be necessary to pursue the argument further. We think it is well settled, that by the law of comity among nations, a corporation created by one sovereignty is permitted to make contracts in another, and to sue in its Courts; and that the same law of comity prevails among the several sovereignties of this Union. The public and well known, and long continued usages of trade; the general acquiescence of the states; the particular legislation of some of them, as well as the legislation of Congress; all concur in proving the truth of this proposition.”

In the leading New York case of *Merrick v. Van Santvoord* (34 N. Y. 208), the Court of Appeals said:

“The rules of comity are subject to local modification by the law making power; but, until so modified, they have the controlling force of legal obligation. The franchises and immunities which they secure, it is the duty of the courts to respect, until the sovereign sees fit to deny them. The rights of a foreign suitor or defendant, so far as they are unabridged by legislation, are as imperative and absolute as those of the citizen. These rules have their place in every system of jurisprudence. As there are certain conservative powers not derived from grant, but inherent in every government because essential to its existence, so there are certain obligations, springing from the necessities of national intercourse, and recognized by all civilized communities in the law of general comity. They have been uniformly acknowledged and enforced by the courts of this state.”

“The theory on which the Supreme Court held the defendant Van Santvoord liable, was, that he was a member of an absconding corporation; that it had migrated from Connecticut to New York; and that, by such migration, it had lost its corporate character, except for the single purpose of charging its shareholders with personal liability, on the contracts made here by its officers. In these views we cannot concur.

“A corporation is an artificial being, and has no dwelling either in its office, its warehouses, its depots or its ships. Its domicile is the

legal jurisdiction of its origin, irrespective of the residence of its officers or the place where its business is transacted. It retains that domicile until it ceases to exist; and its existence continues, within the limits assigned for its duration, so long as it complies with the requirements of its charter, and with the conditions imposed by State laws, maintains its corporate succession by elections in the proper jurisdiction, and continues to exercise its franchises under a grant which has neither been impeached nor revoked.

"To support the theory of migration and forfeiture, the respondents rely mainly upon a passing dictum of Chief Justice Taney, in the case of the Bank of Augusta v. Earle, transcribed by Judge Thompson *in hac verba*, in the subsequent case of Runyan v. Costar (13 Pet. 588; 14 Id. 129.) We think the effect of this dictum has been misapprehended, and that the true import of the observation of the Chief Justice is, not that a corporation is *capable* of migration, and of thereby forfeiting its rights, but that in its nature, as an artificial creation of law, it is utterly *incapable* of migration, and must be deemed to retain its domicile in the jurisdiction from which its being is derived. 'It is very true,' he said, 'that a corporation can have no legal existence out of the boundaries of the sovereignty by which it was created. It exists only in contemplation of law, and by force of law, and when that law ceases to operate, and is no longer obligatory, the corporation can have no existence; it must dwell in the place of its creation, and cannot emigrate to another sovereignty.'

"It was a suggestion in answer to the argument, that, inasmuch as the corporation could not migrate, it could neither contract nor sue, except in the State of its domicile. He admitted its incapacity to migrate, but held that it did not follow that its existence there would not be recognized elsewhere. It was accordingly adjudged, in that case, that contracts made in the City of Mobile, between citizens of Alabama and a Georgia bank, a Pennsylvania bank and a Louisiana railroad company, respectively, could be enforced under the general law of comity as contracts within the scope of their respective charters, though unauthorized by the State of Alabama. The Chief Justice expressed the opinion that no valid reason can be assigned for refusing to give effect to the contracts of foreign corporations, 'when they are not contrary to the known policy of the State, or injurious to its interests. It is nothing more than the admission of the existence of an artificial person, created by the laws of another State, and clothed with the power of making certain contracts. It is but the usual comity of recognizing the law of another state.' (13 Pet. 519, 598-590.) The concession referred to was reiterated in the same sense by Judge Thompson, and in answer to a similar argument in the case of Runyan v. Costar, in which it was adjudged that a coal company organized in New York, for the purpose of mining coal in Pennsylvania, could exercise its franchise by purchasing and holding lands in the latter state; and though by a statute of Pennsylvania, lands so acquired were subject to forfeiture,

the title of the company was good so long as the forfeiture was not enforced by the state (14 Pet. 122, 129)."

"The decisions of the other states, the course of New York legislation, and the general usages of the country, are all opposed to the theory on which this case was decided. From the centralizing tendencies of commerce, the transferable character of corporate stock, and the necessities of domestic and foreign intercourse, the principal offices of many of our most important corporations in the inland states are kept in our seaboard city. It would be equally disastrous to the citizens of our own and of other states, if judicial innovations were permitted in applying the rules of general comity."

In *Erie Railway Co. v. The State*, 31 N. J. L. 531, 543 (Court of Errors and Appeals, 1864), Chief Justice Beasley said:

"It is not denied that the corporate existence of a company is recognized, not by right but of grace, in foreign jurisdictions, nor that each government has the competence to refuse to recognize such existence, except on its own conditions. The principle is universally acknowledged. Hence, laws requiring insurance companies and other foreign corporations to file bonds and submit to other exactions, as a prerequisite to their admission in an incorporated capacity, into the state. Such laws, when rightfully made, are evidently mere police regulations, designed to protect the citizens of the state in which they are enacted from loss or imposition, and on this ground their legality cannot be drawn in question. * * * It is readily to be admitted that a law imposing certain terms upon all foreign corporations as conditions precedent to their acquisition in this state, of the right to act in the unity of their corporate existence, would be legal. Such law would prevent foreign persons from doing any legal act in this state as a corporation, but can it be maintained that such law would have the further effect of leaving the property of the company as the spoil of the first taker? A statute that should abolish the rule of comity and should refuse the recognition of foreign corporations, would, it is conceived, have this effect and no more, i. e. to convert the foreign corporators, as to the state enacting the supposed law, into a partnership of individuals; and thus, although the corporation, as such could not, by suit or otherwise, assert its right to protect its property, the members of the company would be under no such disability."

Corporations are not citizens within the meaning of the clause of the federal constitution "That the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states." In an early New Jersey case the court said:

"The privileges and immunities intended to be secured by the constitution are personal privileges, and in the language of Judge Washington in the case of *Corfield v. Coryell*, 'are those which are in their nature fundamental, which belong of right to the citizens of all free governments, and which have at all times been enjoyed by the citizens of the several states which compose this Union, from the period of be-

coming free, independent, and sovereign.' In the very nature of things, the citizen referred to is a natural person, a human being having rights essential to his character, and not a mere artificial person, the creature of a special charter, having no rights but such as are thereby granted. A corporation having a right to sue like a natural person, may well be considered an inhabitant or citizen of a particular state, for the purpose of bringing suit, when the general purpose and spirit of the law so required. But it is otherwise when the general purpose and spirit of the law, so far from requiring such a construction, require the contrary. An individual citizen possesses powers of locomotion, and has rights which are so essential as to make it highly desirable that they should be uniform throughout the Union, and which, in order to secure and perpetuate mutual friendship, and intercourse among the people of the different states, were with great propriety placed under the protection of the federal constitution. No such reason exists in the case of a corporation. As was said by Justice Thompson, who delivered the opinion of the Supreme Court of the United States in the case of *Runyan v. Costar* (14 Peters, 129), a corporation must dwell in the place of its creation, and cannot migrate to another sovereignty. Other states recognize its existence and general powers, and by comity usually permit it to make contracts, and enforce them by legal remedies within their sovereignty, as if it was a natural person. But such contracts and remedies depend for their validity upon the laws of the state where made or used, and are not valid or to be enforced there without its express or implied sanction. Having the power to give, the state has the power to withhold such sanction; a power so essential to its well being that no court can venture to control it by construction, without a positive provision plainly designed for that object. If then, the state can altogether prohibit a corporation created by one of the other states from exercising its powers within its limits, it may, of course, regulate or tax the exercise of such powers at its discretion. Having no right to come there, such a corporation, if it desires to do so, claims a boon, and must submit to whatever burden may be imposed."¹

"It may, therefore, be conceded, not only that our legislature may put under restraint business transacted in this state by a company created by the law of another state, but, in the exercise of their plenary power, may limit, if they cannot deny, the right of such company to sue in our courts."²

It has been held that the permission of the state for a foreign corporation to come in upon certain conditions, and the acceptance of such terms by the corporation does not constitute a contract. "I think that it might properly be said that it fixes the status of corporations which accepted the terms of such acts."³

1—*Elmer, J., in Tatem v. Wright*, 23 N. J. L. 429 (1852).

2—*Columbia Fire Insurance Co. v. Kinyon*, 37 N. J. L. 33 (1874).

3—*Garrison, V. C., in Groel v. United Electric Company of New Jersey*, 62 N. J. Eq. 397 (1905); see also *Connecticut Mutual Insurance Co. v. Spratley*, 172 U. S. 602.

In a recent case it was held that a foreign corporation having no franchise within the state, being neither a citizen nor a householder thereof, the sole business of which is the furnishing of a patent gas burner, has no standing, in its own right, to demand and receive a supply of gas from a domestic corporation for any purpose whatever.⁴

119. APPLICATION TO FOREIGN CORPORATIONS OF THE GENERAL LAWS AND POLICY OF THE STATE AND OF STATUTES REGULATING DOMESTIC CORPORATIONS.

Foreign corporations doing business in this state shall be subject to the provisions of this act, so far as the same can be applied to foreign corporations.¹

Construing an act of the legislature authorizing any canal company "to lease its canal to any person or persons, or corporation," Mr. Justice Dixon, writing the opinion of the Court of Appeals, said:

"It does not seem to me consistent with the natural import of this expression to hold that it includes only corporations created by the laws of this state. Corporations formed under laws passed beyond the limits of our own commonwealth are too frequent as suitors in our courts, and as subjects of our legislation; they have too well recognized and substantial an existence in the social system of all the states of our Union for us to say that when the legislature speaks of *any* corporation, it means no other than those of its own creation. There is, upon our statute books, scarcely even a general law relating to corporations, in which the legislature has not felt constrained, when desiring to confine its enactments to corporations of our own state, to employ some restrictive phrase which should exclude corporations of other states." ²

The law of this state independent of section 64 of the Corporation act, is that directors of an insolvent corporation are trustees of its funds for its creditors, and subject to the rule that a trustee cannot use property for his own benefit to the disadvantage of the *cestui que trust*. Directors who are creditors, stand upon the same footing as any other creditor, and cannot by any act of their own, obtain a position superior to that of other creditors for whose benefit they hold the trust estate. This rule is applicable to foreign corporations.³

The title to personal property belonging to a foreign corporation, but actually stored in New Jersey and not merely *in transitu*, is to be determined by the law of New Jersey and not by the laws of the state of the corporation's domicile as between residents of such state and residents of other states.⁴

4—Public Service Corporation v. American Lighting Co., 67 N. J. Eq. 122 (1904).

1—Corporation Act, § 96.

2—Stewart v. Lehigh Valley R. R. Co., 38 N. J. L. 505 (Court of Errors & Appeals, 1875).

3—Schmidt v. Perkins, 74 N. J. L. 785 (Court of Errors & Appeals, 1907).

4—Schmidt v. Perkins, 74 N. J. L. 785 (Court of Errors & Appeals, 1907).

120. RECIPROCAL APPLICATION TO FOREIGN CORPORATIONS OF REGULATIONS AND TAXES OF HOME STATES.

When, by the laws of any other state or nation, any other or greater taxes, fines, penalties, licenses, fees or other obligations or requirements are imposed upon corporations of this state, doing business in such other state or nation, or upon their agents therein, than the laws of this state impose upon their corporations or agents doing business in this state, so long as such laws continue in force in such foreign state or nation, the same taxes, fines, penalties, licenses, fees, obligations and requirements of whatever kind shall be imposed upon all corporations of such other state or nation doing business within this state and upon their agents here; provided, that nothing herein shall be held to repeal any duty, condition or requirement now imposed by law upon such corporations of other states or nations transacting business in this state.¹

In the absence of evidence to the contrary, however, it must be presumed that the laws of another state are similar to the laws of New Jersey so as to authorize a corporation formed in New Jersey to exercise in such other state the powers conferred upon it by its charter and the laws of New Jersey.²

121. MODE BY WHICH FOREIGN CORPORATIONS MAY OBTAIN STATUTORY AUTHORITY TO TRANSACT BUSINESS IN THE STATE.

Every foreign corporation, except banking, insurance, ferry and railroad corporations, before transacting any business in this state, shall file in the office of the secretary of state a copy of its charter or certificate of incorporation, attested by its president and secretary, under its corporate seal, and a statement attested in like manner of the amount of its capital stock authorized and the amount actually issued, the character of the business which it is to transact in this state, and designating its principal office in this state and an agent, who shall be a domestic corporation or a natural person of full age actually resident in this state, together with his place of abode, upon which agent process against such corporation may be served, and the agency so constituted shall continue until the substitution, by writing, of another agent; upon the filing of such copy and statement the secretary of state shall issue to such corporation a certificate that it is authorized to transact business in this state, and that the business is such as may be lawfully transacted by corporations of this state, and he shall keep a record of all such certificates issued.¹

If said agent shall die, remove from the state or become disqualified, such corporation shall forthwith file in the office of the secretary of state a written appointment of another agent, attested in the manner

1—Corporation Act, § 101. See *Texas Co. v. Dickinson*, 75 Atl. 803 (1910).

2—*Dittman v. Distilling Co. of America*, 64 N. J. Eq. 537 (1903).

1—Corporation Act, § 97.

above provided, and in case of the omission to do so within thirty days after such death, removal or disqualification, then the secretary of state, upon being satisfied that such omission has continued for thirty days, shall, by entry on the record thereof, revoke the certificate of authority to transact business within this state, and process against such corporation in actions upon any liability incurred within this state before the designation of another agent may, after such revocation, be served upon the secretary of state; at the time of such service the plaintiff shall pay to the secretary of state for the use of the state two dollars, to be included in the taxable costs of such plaintiff, and the secretary of state shall forthwith mail a copy of such process to such corporation at its general office or to the address of some officer thereof, if known to him.²

122. WHAT CONSTITUTES DOING OR TRANSACTION OF BUSINESS IN THE STATE WITHIN THE MEANING OF THE STATUTE.

The transaction of business by a foreign corporation within the meaning of the statute means the general prosecution of the ordinary business of the corporation. Whether the specific acts alleged to constitute the transaction of business in a particular case are done under such circumstances as to require the inference that the foreign corporation is engaged in the general prosecution of its ordinary business, is a question of fact to be decided by the trial court and its finding is not open to review where there is any evidence to sustain it.¹

It was held that where a foreign corporation came into the state of New Jersey and organized and controlled a corporation, causing it to issue its bonds and stock, and took them and purchased stocks held in various New Jersey corporations, and also took from such stockholders sums of money as further consideration, and gave a guarantee that another corporation would pay the interest on its bonds, such acts constituted a transaction of business.²

A foreign corporation which makes a single sale of its product and accepts a guarantee of payment in this state does not transact business within the meaning of the statute.³

The Court of Errors and Appeals said: "On consideration of the entire legislation on this subject the construction of our statute seems to be clear. The statute requires the filing by the corporation of a copy of its charter, and a statement of the amount of capital authorized and the amount actually issued, the character of the business which it is to transact in this state and designating its principal office in this state.
* * *

A statement of the amount of the capital stock authorized and

2—Corporation Act, § 99.

1—Von Seyfried v. Vollers, 75 N. J. L. 405 (1907).

2—Groel v. United Electric Company of New Jersey, 69 N. J. Eq. 397 (1905).

3—D. & H. Canal Co. v. Mahlenbrock, 63 N. J. L. 281 (Court of Errors & Appeals, 1899).

the amount actually issued would be an appropriate requirement if the corporation were to engage in business in this state, but inapt in so far as relates to a single isolated transaction. 'The character of the business which it is to transact in this state' and the designation of its principal office in this state plainly imply the engaging in business in the sense in which that term was defined in *Hoagland v. Segur*. The purpose of the certificate issued by the secretary of state is to authorize the corporation to 'transact business in this state,' and that officer is required to certify that the business is such as may be lawfully transacted by corporations of this state. These several provisions as applied to a single isolated transaction, like the one in question, would be inappropriate. A construction which would require the plaintiff, proposing to make this sale of coal and accept a guarantee of payment, first to file a statement of the amount of its capital stock authorized and the amount actually issued, the character of the business which it was to transact in this state, and to establish a principal office in this state, would be unreasonable. The section of the act which imposes under certain conditions on foreign corporations 'doing business within this state' the same taxes, fines, penalties, license fees, etc., imposed on corporations of this state doing business in the other state, sheds a light on the meaning of words 'doing business in this state' in the preceding section. It would scarcely be contended that the plaintiff because of this isolated transaction would be liable to taxes and license fees, etc. which by the laws of Pennsylvania are exacted from New Jersey corporations doing business in that state. The section which provides that such a corporation shall not maintain any action in this state upon a contract made by it in this state must receive the same construction. The words of the section are 'corporation so transacting business;' that is, corporations transacting business for which a certificate from the secretary of state is by the preceding section made necessary."⁴

Nor does the statute apply where the contract sued on was made in a foreign state, and was a single transaction with the defendant.⁵

Thus where an order was placed with an agent of a foreign corporation at the defendant's office in the state and was subsequently mailed by the defendant to the foreign corporation at its office in a foreign state for its acceptance, and was accepted by the foreign corporation, it was held that such contract was executed in the foreign state and was not a corporate act done in New Jersey.⁶

So, also it was held that the taking in this state of applications for advertising space, that do not become contracts until accepted by the officers of a Pennsylvania corporation in that state, which contracts are

⁴—*D. & H. Canal Co. v. Mahlenbrock*, 63 N. J. L. 281 (Court of Errors & Appeals, 1899).

⁵—*MacMillan Co. v. Stewart*, 69 N. J. L. 212 (1903). Affirmed 69 N. J. L. 676 (Court of Errors & Appeals, 1903); *D. & H. Canal Co. v. Mahlenbrock*, 63 N. J. L. 281 (Court of Errors & Appeals, 1899).

⁶—*Slaytor-Jennings Co. v. Specialty Paper Box Co.*, 69 N. J. L. 214 (1903).

performed by the insertion of the advertisement in a book made and published in Pennsylvania, is not the transaction of business in this state within the prohibition of section 97 of the Corporation act.⁷

By expressly prohibiting the maintenance of suits on contracts made in this state, the act impliedly permits suits on contracts made elsewhere. The court said "We interpret the law to permit foreign corporations, without complying with its provisions, to maintain suits in this state on contracts made anywhere before the passage of the act, and on contracts made outside of the state since the passage of the act."⁸

123. EFFECT OF FAILURE TO OBTAIN STATUTORY CERTIFICATE OF AUTHORITY TO TRANSACT BUSINESS.

Until such corporation so transacting business in this state shall have obtained said certificate of the secretary of state, it shall not maintain any action in this state, upon any contract made by it in this state, provided, that nothing herein shall prevent the enforcement of any contract made prior to the fourteenth day of March, one thousand eight hundred and ninety-five.¹

Every foreign corporation transacting any business in any manner whatsoever, directly or indirectly, in this state, without having first obtained authority therefor, as hereinabove provided, shall for such offense forfeit to the state the sum of two hundred dollars, to be recovered with costs in an action prosecuted by the attorney-general in the name of the state.²

"A corporation *strictissimi juris* has no life beyond the boundaries of the state that created it. Its existence elsewhere is due solely to comity. As an abstract proposition every state determines for itself whether it will recognize any corporate bodies but those of its own creation, and as a practical question it decides the terms upon which foreign corporations shall be permitted to invade its territory. In aid of the legislative policy so declared the courts of a state will refuse to entertain suits to enforce obligations that have arisen in the course of transactions thus reprobated. To this extent such obligations lack the sanction of law, but to designate them as void in the sense that immoral or prohibited acts are void is an inexact use of terms. State policies differ in nothing more widely than in their attitude toward corporate affairs, each government having plenary power to enforce its own policy within its own borders, and having no power to impose such policy upon others."³

A contract made by a foreign corporation in violation of the statutory

7—Bell Telephone Co. v. Galen Hall Co., 77 N. J. L. 253 (1909).

8—Faxon Co. v. Lovett Co., 60 N. J. L. 128 (1897).

1—Corporation Act, § 98.

2—Corporation Act, § 100.

3—Garrison, J., in *Alleghany Co. v. Allen*, 68 N. J. L. 68 (1902); affirmed 69 N. J. L. 270 (Court of Errors and Appeals, 1903).

regulations of another state and unenforceable in the courts of that state is not, *ipso facto*, void.⁴

In *Benton v. Elizabeth*,⁵ it was held that if the prosecutors of a certiorari do not, in their reasons filed, question the status of a foreign corporation, it will be assumed, on final hearing that the corporation has complied with the statutory prerequisites to the transaction of business in this state.

It is not necessary to allege in an indictment for embezzlement that the corporation whose property is claimed has been embezzled is entitled to do business in this state, nor is it a defence to the indictment that the corporation has failed to file the certificate required by law to authorize it to do business in this state.⁶

124. ENFORCEMENT OF LIABILITY OF STOCKHOLDERS AND OFFICERS OF FOREIGN CORPORATIONS.

A statute enacted in 1897 (P. L. 1897, p. 124) provides that:

No action or proceeding shall be maintained in any court of law of this state against any stockholder, officer or director of any domestic or foreign corporation by or in behalf of any creditor of such corporation to enforce any statutory personal liability of such stockholder, officer or director for or upon any debt, default or obligation of such corporation, whether such statutory personal liability be deemed penal or contractual, if such statutory personal liability be created by or arise from the statutes or laws of any other state or foreign country, and no pending or future action or proceeding to enforce any such statutory personal liability shall be maintained in any court of this state other than in a nature of an equitable accounting for the proportionate benefit of all parties interested, to which such corporation and its legal representatives, if any, and all of its creditors and all of its stockholders shall be necessary parties.

In *Johnson v. Tennessee Oil, etc. Co.*, 74 N. J. Eq. 32 (1908), it was held that this statute affects only the question of parties and procedure, the ultimate liability of a stockholder in a foreign corporation depending wholly on the law of the state of incorporation.

In *Derrickson v. Smith*, 27 N. J. L. 166 (1858), it was held, that where a statute of the State of New York required certain corporations to report annually the condition of their affairs, and to have the report published, and provided that on failure to do so, all the trustees of such corporation should be jointly and severally liable for the debts of the corporation, that an action brought by a creditor of the company against a trustee to recover on a liability incurred under that statute, cannot be enforced in this state. The Court said that the liability "is, in fact, a

4—*Alleghany Co. v. Allen*, 68 N. J. L. 68 (1902); affirmed 69 N. J. L. 270 (Court of Errors & Appeals, 1903).

5—61 N. J. L. 411 (1898); affirmed 61 N. J. L. 693 (Court of Errors & Appeals, 1898).

6—*State v. Reynolds*, 65 N. J. L. 424 (1900).

penalty inflicted upon the trustees for failure to perform a duty enjoined by the statute. It is immaterial whether that penalty be a specified sum or the payment of debts of the corporation. In either case it is a penalty imposed by statute; nor is it perceived how the liability of the individual trustee to pay the debts of the corporation can be said, in any proper way, to be founded on contract. * * * Such liability is clearly the creature of the statute."

In a suit by the receiver of a foreign corporation to recover assessments, the proceedings of the courts of the domicile of the corporation are binding upon the members of the company so far as they concern the administration of its affairs.¹

The decree of the foreign tribunal is conclusive as to the fact that an assessment is necessary, as to the amount of money required to be raised by the assessment and as to the *pro rata* of each member.²

Equity will not retain a bill to enforce the liability of a number of defendants as stockholders in a corporation under a double liability statute of a foreign state, on the ground that such retention would prevent a multiplicity of actions at law where it appears that each of the complainants has a separate and independent claim against the several defendants, the adjudication of the validity of one of which would settle nothing with relation to the other.³

125. THE POWERS OF A FOREIGN CORPORATION.

"Wherever a corporation goes for business, it carries its charter, as that is the law of its existence, * * * and the charter is the same abroad that it is at home. Whatever disabilities are placed upon the corporation at home it retains abroad, and whatever legislative control it is subject to at home, must be recognized and submitted to by those who deal with it elsewhere." ¹

The courts of one state, however, will not take judicial notice of the statutes of another state. In pleading a foreign statute, it must be set forth in substance, so that the court may see that the right or liability which depends exclusively on a statutory enactment arises by force of such statutory provision. The averment "Pursuant to the statute," without setting forth the substance of the statute, is insufficient. Pleading a foreign statute is like pleading a private act of parliament: it must be recited, or at least such parts of it as are material to the action or defence, must be stated in the pleading.²

A contract void by the law of the state where made will not be enforced in this state. When the statute of the state where a contract is made by a foreign corporation does not expressly declare the contract to be void by reason of the failure of such corporation to comply with

1—Swing v. Consolidated Fruit Jar Co., 74 N. J. L. 145 (1906).

2—Stockley, Receiver, v. Perry, 26 N. J. L. J. 4, 9.

3—Miller v. Willett, 71 N. J. Eq. 741 (Court of Errors & Appeals, 1907).

1—109 U. S. 527.

2—Salt Lake City National Bank v. Hendrickson, 40 N. J. L. 52 (1878).

the statutory regulations of such state, and recourse must be had to interpretation to settle the question of its validity, the construction given to the statute by the courts of the state which enacted it will be adopted in New Jersey.³

Where a foreign manufacturing corporation doing business in New Jersey executes a chattel and real estate mortgage on property within the state to resident creditors to secure the payment of debts contracted and payable there, which mortgage is valid in New Jersey, and under the particular statute of such foreign state under which the corporation was created, such mortgage will not be held invalid because the execution thereof was contrary to a general statute of such foreign state inhibiting such corporations from transferring their property to stockholders, officers or creditors thereof, in contemplation of insolvency.⁴ The court said:

"It is elementary that the general laws of a state have, *per se*, no extra territorial force. This company brought with it from New York to New Jersey its chartered powers; it did not bring with it the general laws of the state of New York."⁵

Independent of statutory aid, the law of comity recognizes and permits only the exercise of the business functions of foreign corporations, including the purchase and sale of property, but is not extended to extraordinary powers and privileges, such as the power to condemn property, to enjoy a monopoly, to be exempt from taxation and the like.⁶

The legislature may grant to a foreign corporation power to exercise its franchises or independent powers in the nature of corporate franchises within the state, without making it a domestic corporation. In such case the foreign corporation will take, under legislative sanction those rights only which are within the expressed terms of the grant.⁷

"Any of our citizens, by force of the common law, could use all the conveniences which a railroad affords for the purpose of traveling and transportation, and a foreign corporation, by the comity of states, could alike use them the same as a citizen of another state. And I concede that a foreign corporation could, on our railroads, exercise the rights of a common carrier, for the business of a common carrier exists at common law, and any of our citizens could become such without legislative aid, and use all the facilities of travel and commerce, whether by railroad or otherwise, which are of common right. We extend to foreign express companies the use of our own roads to carry on a separate business of transportation, and on the principles of comity, we would give them every general right which our citizens have by force of the com-

3—*Allegheny Co. v. Allen*, 69 N. J. L. 270 (Court of Errors & Appeals, 1903); *Watson v. Lane*, 52 N. J. L. 550 (Court of Errors & Appeals, 1890).

4—*Boehme v. Rawl*, 51 N. J. Eq. 541 (1893).

5—*Boehme v. Rawl*, 51 N. J. Eq. 541 (1893).

6—*Boehme v. Rawl*, 51 N. J. Eq. 541 (1893).

7—*State Board of Assessors v. Morris & Essex R. R. Co.*, 49 N. J. L. 193 (Court of Errors & Appeals, 1886).

mon law. These common law rights, however, are different from the franchises of building and operating a railroad. The latter are local in their very nature, and instead of being exercised by the government, they are lodged, by legislative action, in the hands of individuals or corporations.

"There are certain franchises not necessarily local, as, for instance, the creation of a corporation, and a corporation, like an individual, though belonging to another state, may have all the common rights which our people are entitled to, unless in some way abridged by reason of state policy. The right to build a turnpike and take tolls for its use, is local—that it, it must be exercised within the jurisdiction of its creation, and by such instrumentalities as the legislature has provided or recognized. A railroad, both as to its construction and running, is the same. Franchises of this nature are special, and must be exercised in subserviency to such hands as the legislature has designated." ⁸

Any corporation created by any other state, or by any foreign state, kingdom or government may acquire by devise or otherwise and hold, mortgage, lease and convey real estate in this state for the purpose of prosecuting its business or objects, or such real estate as it may acquire by way of mortgage or otherwise, in the payment of debts due such corporation; provided such foreign state, kingdom or government, under whose laws such corporation was created, shall not be at the time of such purchase at war with the United States.⁹

It shall be lawful for any foreign corporation whatsoever, other than municipal corporations, to purchase and convey, to lease, hold, occupy and use for the purposes of such corporation, such real estate in this state as may be devised or conveyed to it.¹⁰

126. JUDICIAL CONTROL OF FOREIGN CORPORATIONS.

In a suit brought by stockholders of a foreign corporation against that corporation and another corporation to which it had leased its road, lands etc., all of which were out of this jurisdiction, seeking relief in regard to the transactions of those corporations with each other, the Court of Chancery, on demurrer, declined to take jurisdiction, on the ground that the courts of New York were the proper forum for the litigation.¹

In a recent case in the Court of Errors and Appeals, Judge Dill said: "The court assumed to exercise visitatorial powers over two foreign corporations which are not parties to this suit and to regulate the management of their internal affairs. The phrase 'internal affairs of a corporation,' as here used, is well defined in the case of *North State, etc. Mining Co. v. Field*, 64 Md. 151, 20 Atl. 1039, as follows: 'Where the act

8—*MacGregor v. Erie Ry. Co.*, 35 N. J. L. 89 (1871).

9—*Corporation Act*, § 95.

10—*P. L.* 1903, p. 42.

1—*Gregory v. N. Y. L. E. & W. Railroad Co.*, 40 N. J. Eq. 38 (1885); see also *Hudson v. Knickerbocker Life Ins. Co.*, 28 N. J. Eq. 167 (1877).

complained of affects the complainant solely in his capacity as a member of the corporation, whether it be as stockholder, director, president, or other officer, and is the act of the corporation, whether acting in stockholders' meeting, or through its agents, the board of directors, then such action is the management of the internal affairs of the corporation, and, in case of a foreign corporation, our courts will not take jurisdiction.' The courts of this state do not possess such jurisdiction, and any suggestion of its assumption we emphatically repudiate. An injunction which enjoins the directors of a corporation as individuals, but with respect to corporate affairs, is an injunction against the corporation. We are quite satisfied again to approve of the language of Vice-Chancellor, now Mr. Justice Reed, when in the case of *Stockton, Attorney General, v. American Tobacco Co.*, 55 N. J. Eq. 352, 36 Atl. 971, he said: 'Nor, in my judgment, is this result evaded by enjoining the officers individually instead of restraining the corporation. It is perfectly obvious that what has been done since the organization, and what is intended to be done in the future, are corporate, and not individual, acts. The power of the corporation to select its officers and agents in the manner prescribed by the corporation act or permitted by law is plenary. Now, it seems a paradox to say that a corporation can do through its agents what the agents cannot do. Inasmuch as corporate existence can only be manifested through its officers, and corporate privileges can only be utilized by means of agents, it is impossible to detach the corporation from those who represent it and deny to the latter what is conceded to the former. An injunction which ties the hands of the officers and agents of a corporation from transacting any corporate business is the exact equivalent of an injunction which prevents the corporation from transacting any business, which, as already remarked, is the equivalent of a judgment on quo warranto.' It is unnecessary to analyze again the terms of the injunction in referring to its extraordinary scope and effect. In a form sweeping, mandatory, and embodying the ingenious theory of the complainant, the injunction, while purporting not to disturb or interfere with the integrity and autonomy of the foreign corporations, but only to enjoin the individuals from transferring property of an extensive business having its situs in foreign states, does, in fact, substance, and effect, regulate and control the internal affairs of corporations chartered by foreign sovereignties and prevents freedom of action on the part of corporations not made parties to the suit, which we have held to be distinct legal entities and controlled by foreign laws. In violation of every obligation of official duty and responsibility imposed by law upon officers and directors, it substitutes the will of the Chancellor for deliberate corporate action. Such assumption of power cannot be approved or tolerated without a complete destruction of equitable doctrines as applied to corporations, and a subversion of the law affecting corporate rights, duties and relations. As Chancellor Runyon said in *Gregory v. N. Y., etc. Ry. Co.*, 40 N. J. Eq. 38: 'It is almost too obvious for remark that this court cannot

regulate the internal affairs of foreign corporations, nor can it enforce its decrees out of this state.' State comity is opposed to the assumption of such jurisdiction and to the usurpation by one state of the power of another over its own institutions."²

127. ACTIONS AND SUITS BY AND AGAINST FOREIGN CORPORATIONS.

Since the case of *Moulin v. Insurance Co.*, 24 N. J. L. 222, and 25 N. J. L. 57, it must be regarded as the settled law of this court, that if a corporation makes a contract in a state other than that in which it was chartered, it thereby submits itself to the jurisdiction of such foreign sovereignty so far as to be liable to suit therein in regard to that contract, when summoned according to the laws of the state.¹

"If a corporation may sue within a foreign jurisdiction, it would seem consistent with sound principle that it should also be liable to be sued within such jurisdiction. The difficulty is this, that process against a corporation must, at common law, be served upon the principal officer of the corporation within the jurisdiction of that sovereignty by which it was created. The rule is founded upon the principle, that the artificial, invisible, and intangible corporate body is exclusively the creature of the law; that it has no existence, except by operation of law, and that, consequently, it has no existence without the limits of that sovereignty, and beyond the operation of those laws by which it was created, and by whose power it exists.

"The rule rests upon a highly artificial reason, and, however, technically just, is confined at this day in its application within exceedingly narrow limits. A corporation may own property, may transact business, may contract debts; it may bring suits, it may use its common seal; nay, it may be sued within a foreign jurisdiction, provided a voluntary appearance is entered to the action. It has then existence, vitality, efficiency, beyond the jurisdiction of the sovereignty which created it, provided it be voluntarily exercised. If it be said that all these acts are performed by its agents, as they may be in a case of a private individual, and that the corporation itself is not present, the answer is that a corporation acts nowhere, except by its officers and agents. It has no tangible existence, except through its officers. For all practical purposes, its existence is as real, as vital, and efficient elsewhere as within the jurisdiction that created it. It may perform every act without the jurisdiction of the sovereignty that created it that it may within it. Its existence anywhere and everywhere is but ideal. It has no actual personal identity and existence as a natural person has, no body which may exist in one place and be served with process while its agents and officers are in another. Process can only be served upon the officers of the corporation within its own jurisdiction, not upon the corporation itself.

2—*Jackson v. Hooper*, 75 Atl. 568 (Court of Errors & Appeals, 1910).

1—*National Condensed Milk Co. v. Brandenburg*, 40 N. J. L. 111 (1878).

"Process cannot be served upon the officer of a corporation in a foreign jurisdiction, because he does not carry his official character and functions with him. And yet the officers and agents of corporations do carry their official character and functions with them into foreign jurisdictions, for the purpose of making contracts and transacting the business of the corporation. The seal of a corporation, its distinguishing badge, at the common law the only evidence of its contracts, may be taken by its officers and used within a foreign jurisdiction.

"Doubts were formerly entertained whether a corporation could make a contract or maintain an action out of its own jurisdiction, or whether its property could be attached in a foreign jurisdiction. These questions have been long since settled, either by judicial construction or legislative enactment, in accordance with the reason of the thing and the usage of the commercial world. Sound principle requires that while the powers of corporations are world wide, while for all practical purposes they may exist and act everywhere, the technical rule of the common law, that they exist only within the jurisdiction of the sovereignty which created them, should be applied only within its strictest limits and not be suffered to defeat the obvious claims of justice. * * *

"The question now before the court is not upon the validity of the common law principle; to that we adhere. The suit is brought upon a judgment recovered in the state of New York upon a contract made by the corporation in that state. The process in the original action was served, and the defendants' appearance effected in strict conformity with the mode prescribed by the laws of that state. It is admitted by the pleadings that the individual upon whom process was served, was president of the corporation when the contract was made and when the process was served. The simple inquiry is, whether the statute of the state of New York, which authorizes the service of process in the mode adopted in this case, is so unreasonable, so contrary to natural justice and the principles of natural law, that it ought not to be sanctioned." 2

"By the comity universally acknowledged in the states of this Union and acted upon by the Supreme Court in the case of *Bank of Augusta v. Earle* (13 Pet. 519), corporations may send their officers and agents into other states, transact their business, and make contracts there; and in some instances the laws of the states prescribe the mode and terms upon which they may do so. I am not prepared to say, that if they choose to avail themselves of this privilege, natural justice will be violated by subjecting their officers and agents to the service of process on behalf of the corporation they represent; on the contrary, I think natural justice requires that they shall be subject to the action of the courts of the states whose comity they thus invoke. For the purpose of being sued, they ought in such cases to be regarded as

2—*Moulin v. Insurance Co.*, 25 N. J. L. 57 (1855).

voluntarily placing themselves in the situation of citizens of that state. Any natural person who goes into another state carries along with him all his personal liabilities; and there is quite as much reason that a corporation which chooses to open an office and transact its business, or to authorize contracts to be made in another state, should be regarded as thereby voluntarily submitting itself to the action of the laws of that state, as well in reference to the mode of commencing suits against it, as to the interpretation of the contracts so made. But I am quite prepared to say, that where a corporation confines its business operations to the state which has chartered it, a law of another state, which sanctions the service of process upon one of its officers or members accidentally within its jurisdiction is unreasonable, and so contrary to natural justice and to the principles of international law that the courts of other states ought not to sanction it. In such a case, a president or other officer ought not to be considered as carrying his official character along with him."³

"Upon general principles, and in the absence of statutory innovations, it is to be regarded as settled, in this state at least, that if a foreign corporation, at the time of the commencement of suit, does not do business, and has not any office or place of business in this state, the contract sued on not having been entered into in this state, such corporation, except by its own consent, cannot be brought within the jurisdiction of this or any court of this state. Under such circumstances, the officers or agents of such foreign corporation, when they come into this jurisdiction, do not bring with them their official character or functions and are not to be esteemed, out of the sovereignty by the laws of which the corporate body exists, the representatives for the purpose of responding to suits of law of such corporate body. This is the principle upon which the case of *Moulin v. Insurance Company*, 4 Zab. 222, is founded."⁴

A foreign corporation which confines its business within the state by which it was created and transacts no business in this state, cannot be brought within the jurisdiction of the courts of this state by service of process upon one of its officers in such a way as to give a judgment *in personam*.⁵

But if a corporation of one state establish an agency and transact business in a foreign state, and specially authorize an agent to receive service of process, the company recognizes the laws of that state, and is bound by process served upon its agent, at any time before the suitor has notice of the determination of such agency.⁶

"Although our statutes have long contained provisions, according to which the court of chancery may make decrees against absent de-

3—*Moulin v. Insurance Co.*, 24 N. J. L. 222, 233 (1853).

4—Chief Justice Beasley in *Camden Rolling Mill Co. v. Swede Iron Co.*, 32 N. J. L. 15 (1866).

5—*Goldmark v. Magnolia Metal Company*, 65 N. J. L. 341 (1900).

6—*Capen v. Insurance Co.*, 25 N. J. L. 67 (1855).

defendants with the same effect as if they were present, yet it must be remembered that, since the adoption of the fourteenth amendment of the federal constitution, in 1868, New Jersey has not possessed sovereign power in this regard. The clause in that amendment, declaring that no state should deprive any person of life, liberty or property without due process of law, annulled such of our statutes as authorized judicial proceedings not in harmony with that injunction. What that injunction requires, in order to render valid the judgments and decrees of courts affecting these rights of persons, has been already decided by the supreme court of the United States so far as our present purpose is concerned.

"In *Pennoyer v. Neff*, 95 U. S. 714, it was held that the term 'due process of law,' when applied to judicial proceedings which were not in the nature of a proceeding *in rem*, required that the defendant in a state court should be brought within the jurisdiction either by service of process within the state or by his voluntary appearance; and in *St. Clair v. Cox*, 106 U. S. 350, the same rule was declared as to foreign corporations. The stringency of the rule was exemplified in *Pennoyer v. Neff*. There Neff, owning land in Oregon, but not residing in the state, was sued therein by Mitchell upon a money demand, and the court ordered that service of the summons should be made upon him by publication in a newspaper. After such publication and his failure to appear judgment was rendered against him, in execution of which his land was sold to Pennoyer. All these proceedings were in accordance with the statutes of Oregon, yet the federal supreme court decided that Neff's title was undisturbed, because he had not been cited by due process of law. Thus even the title to land, which is peculiarly a subject of local regulation, is protected by this supreme law.

"No doubt, when the object of a suit is to enforce a specific lien upon property of the defendant within the state, or when the court obtains control over such property, or when the status of a citizen of the state is the subject for adjudication, a state court may be authorized, after reasonable effort to notify the absent defendant, to enforce the claim of the plaintiff respecting such property or status. In such cases the court acquires a jurisdiction *quasi in rem* sufficient to support the limited judgment; but the jurisdiction must precede the adjudication; the judgment cannot be made valid by the fact that steps might be taken to enforce it.

"In the present case there is nothing on which such limited jurisdiction can be predicated. The suit is, as equity suits generally are, *in personam*, and according to the uncontroverted averment of the plea even the property, to which the bill alleges these defendants are inequitably making claim, is not within the state."⁷

A foreign corporation carrying on business within this state, under legislative sanction, is liable for injuries occasioned by its acts upon

⁷—*Wilson v. American Palace Car Co.*, 65 N. J. Eq. 730 (Court of Errors & Appeals, 1903).

the same principles and to the same extent that a company incorporated by the laws of this state would be.⁸

It was held in an early case that if a corporation, chartered in this state, open an office and transact business in another state, and afterwards withdraw its office and cease to transact business in that state, and after such withdrawal a suit is commenced against the company in such state, on a contract made therein, and process is served upon its officers when in that state, the corporation will be properly in court under such process.⁹

And so, for a cause of action arising in this state, while a foreign corporation is transacting business here under a license obtained under the statute, chancery can enforce its jurisdiction by process served on the designated agent, whether the corporation is actually engaged in business here at the time of service, or not, and such construction of the statute is not violative of the fourteenth amendment of the federal constitution, in relation to due process of law. Though the business out of which a cause of action against a foreign corporation arises within the state was not within that specified in the application filed by it, it can be reached by process served on its designated agent.¹⁰

A foreign corporation which has no office, agent or place of business within the state, and has never made application for the right of transacting business under the laws of the state, and has no contract to be performed in the state, and which has not been legally served with process, may raise the question of jurisdiction by a preliminary plea to the jurisdiction, asking the judgment of the court on whether it should answer the bill. Such a corporation is not brought into court by due process of law by service of process upon its vice-president, who was a resident of the state of its incorporation, and who was not authorized or directed by the corporation to make the trip into this state on the occasion when the attempted service of process was made.¹¹

Such a plea, showing lack of jurisdiction over the defendant, need not designate another tribunal in which he may be sued.¹²

In *Puster v. Parker Mercantile Co.*, 64 N. J. Eq. 599 (1903), it was held that where a subpoena to answer was served upon the vice-president of a foreign corporation while casually in the state on pri-

8—*Austin v. New York & Erie R. R.*, 25 N. J. L. 381 (1856).

9—*Moulin v. Insurance Co.*, 25 N. J. L. 57 (1855).

10—*Groel v. United Electric Company of New Jersey*, 69 N. J. Eq. 397 (1905).

11—*Puster v. Parker Mercantile Company*, 70 N. J. Eq. 771 (Court of Errors & Appeals, 1906); *Wilson v. American Palace Car Co.*, 65 N. J. Eq. 730 (Court of Errors & Appeals, 1903). See, however, as to actions quasi in rem, *Amparo Mining Co. v. Fidelity Trust Co.*, 74 N. J. Eq. 197 (1908); affirmed 73 Atl. 249 (1909).

12—*Wilson v. American Palace Car Co.*, 65 N. J. Eq. 730 (Court of Errors & Appeals, 1903).

vate business, such service would not be set aside on motion. Vice-Chancellor Stevens said: "The practice here adopted is that which prevails in the courts of the United States. *Goldey v. Morning News*, 156 U. S. 518. It does not appear to have the sanction of the courts of this state. In *Kirkpatrick v. Post*, 53 N. J. Eq. 592, motion was made to set aside an order of publication as against two absent defendants, who were non-residents. The motion was denied, both in the court of chancery and on appeal (53 N. J. Eq. 641), on the ground that, being a mere notice to the defendants of the pending litigation, and thus affording them an opportunity of coming in and taking part in it, of they saw fit, it could not be the subject of complaint, as it could do them no harm. In that case there had been an order of publication. A notice of this order had not only been sent through the mail, but had actually been received. In the case in hand, the subpoena was served upon the vice-president of the corporation while casually in the state on private business. The situation in both cases is substantially the same. If in the one case the service could do no harm, neither could it in the other. It gave, in both, actual notice of the pendency of the suit and an opportunity to come in and defend on the merits, at the option of the person sued. In neither case, to use the language of the chief-justice in the case cited, is it to be assumed that the court of chancery would pronounce a decree founded on process of this character that would be illegal and contrary to the federal constitution. If the fact be truly set out in defendant's affidavits, it was not, at the time of attempted service, within the state for any purpose whatever, and consequently no better served and more subject to the jurisdiction of this court than was the defendant *Post* in the case cited. As a matter of practice, it seems to me that it would be most illogical to hold that in the case of publication, followed by service out of the state, the motion to vacate should, on the ground stated, be denied, while in the case of service within the state, equally ineffective of itself to bring the defendant within the jurisdiction, the motion to set aside the service should be allowed."

And in a later case Vice-Chancellor Emery said:

"The defendant being thus entitled to present the question of jurisdiction by plea, the first question is whether any formal appearance of any kind, other than that made by the filing of the plea itself, is necessary, in order that the plea may be heard. A previous independent formal appearance of some kind was necessary under the English practice, because an appearance (entered either by defendant or by complainant for him under the rules) was considered necessary for the subsequent proceedings to procure an answer and for decree. (1 Dan. Ch. Pr. [6th Am. ed.] *536.) Under our statutes and practice, which is the general American practice, appearances are not now necessary in order to compel answer or for decree. In the American practice, the previous formal appearance by defendant has not, therefore, been generally considered essential to the regularity of a de-

murrer or answer or other pleading, and the pleading itself has been considered a sufficient formal appearance to justify the court in proceeding to hearing upon it. In *State of New Jersey v. State of New York*, 6 Pet. 323 (1832), Chief-Justice Marshall, on the objection that no appearance had been entered, considered the demurrer an appearance and that no other appearance was necessary. In *Eldred v. Bank*, 17 Wall. 545 (1873), Justice Miller said (at p. 551) the filing of a plea was considered a sufficient appearance, and on its withdrawal defendant was considered as being still in court. In *Livingston v. Gibbons*, 4 Johns. Ch. *94, an answer upon which decree was entered without formal appearance was considered an appearance. In *Albert v. Clarendon Company*, 53 N. J. Eq. 625, Vice-Chancellor Van Fleet said that a general demurrer would be an appearance, but the point now considered was not raised in the case. Other authorities are referred to in 1 Dan. Ch. Pr. (6th Am. ed.) *536, note 2. At common law, the plea of immunity from jurisdiction was in the nature of a plea in abatement and was presented in person and not by attorney and was made apparently without any other appearance than by the plea itself. 1 Chit. Pl. 441, 444; *Blake v. Jones*, 7 Mass. 28 (1810); *Gardner v. Barker*, 12 Mass. 36, 39 (1815). Independent of statute therefore, I think the plea itself in this case is an appearance for the purpose of the hearing on the plea. But our Chancery act, section 3 (Revision of 1902, P. L. of 1902, p. 511), directs that the subpoena must contain a notice 'that the defendant is not required to appear in person on the return day; but, if he intends to make a defence it is only necessary for him to answer, plead or demur to the bill within the time required by law.' There is no rule or decision since this statute was originally passed (P. L. of 1867, p. 166) requiring the entry of a formal appearance before a plea or demurrer can be filed, and, in view of the statute, I doubt whether such additional formal appearance could now be required as a condition of making defense. Certainly, a plea, answer or demurrer, filed by defendant in person without previous formal appearance, would seem to be regular under this statute. The plea in this case is taken under the common seal of the corporation, after being signed by its vice-president, and it may, therefore, stand as in itself an appearance sufficient for the purpose of the hearing and cannot be stricken out because of the supposed irregularity of the previous formal appearance. Where no appearance by plea, demurrer or answer has been made, a formal appearance by a defendant, either general or special, may be necessary for the purpose of making or opposing motions in the case, and it is in these cases that the court fixes the condition of appearance. The conditional appearances under the English practice seem to have been based on the necessity of an appearance as the basis for any subsequent proceedings in the suit and are not applicable if my view of our statute and practice is correct. Neither should the special appearance be stricken out. If the limitation of the purposes of an appearance is not authorized, except by

special order of the court, then the real question arising on such entry relates to the effect of the appearance as entered, with this attempted limitation of its purpose by the solicitor without authority. This question may arise if the plea to the jurisdiction be overruled and further proceedings in the cause be taken by complaint."¹³

The venue of an action brought by a foreign corporation in the county of its principal office against a resident of another county, is subject to change to the county of defendant's residence.¹⁴

The ancient strictness of the common law required that service of every process on corporations must be made within the jurisdiction of that sovereignty by which the corporation was created; but this has long since been relaxed, so as to permit service to be made within any jurisdiction wherein the corporation is engaged in business, in all litigation pertaining to that business; and such is now the rule, independently of any statute prescribing the mode of serving process.¹⁵

The mode of serving process upon a foreign corporation is now prescribed by the Corporation Act (§ 88, as amended by P. L. 1908, p. 176) as follows:

In all personal suits or actions hereafter brought in any court of this state, against any foreign corporation, process may be served upon any officer, director, agent, clerk, or engineer of such corporation, either personally or by leaving a copy thereof at his dwelling house or usual place of abode, or by leaving a copy at the office, depot or usual place of business of such foreign corporation; provided that in case there is no officer, director, agent, clerk or engineer of said corporation residing in this state, nor any office, depot or usual place of business in this state, process may be served upon any motorman, conductor or servant of said corporation while in the discharge of his duties.

Construing the original statute from which the above provision is derived the Supreme Court said:

"It is insisted that by the act of 1865 (Pamph. 467), all foreign corporations are made suable in the courts of this state, whenever any director, clerk, or other agent of such corporation can be found within our territorial limits. Such is not the construction which is put by this court on this statute. Its provisions are to the following effect, viz., that the process against a foreign corporation may be served on any officer, director, agent or engineer of such corporation or body corporate, either personally, or by leaving a copy thereof at the dwelling house or usual place of abode of such officer, director, agent, clerk or engineer, or by leaving a true copy of said process at the office,

13—Vice Chancellor Emery in *Groel v. United Electric Co. of New Jersey*, 68 N. J. Eq. 249 (1904).

14—*Starke Advertising Agency v. Adams*, 74 N. J. L. 143 (1906); see also *D. L. & W. R. R. Co. v. North Jersey Street Railway Co.*, 65 N. J. L. 524 (1900).

15—*Freeholders of Mercer v. Pennsylvania R. R. Co.*, 42 N. J. L. 490 (1880).

depot, or usual place of business of such foreign corporation, etc. We find thus a mode is prescribed of effecting service of process on foreign corporations; but the question still remains, in what cases can they be so served? Can they be so served when, upon general principles, the courts of this state have no jurisdiction? The statute does not say so. There is not a word in it indicative of an intention to amplify the capacity of the court with regard to that class of cases in which these creatures of foreign laws are parties-defendants. The statute does not give any new right of suit; nor does it purport to take away any of the privileges of foreign corporations. It simply appoints a method of bringing corporations invested with a foreign character into the courts of this state, when such courts have jurisdiction over them. We think that the act in question has no scope beyond this. It may be further observed that the interpretation contended for in behalf of the plaintiff, is one that could be judicially adopted only by force of the plainest manifestation of legislative intent. It would seem to be an improbable construction, for it is difficult to believe that it was the design to place within the jurisdiction of our courts all the corporations of the world, merely from the fact that a director, clerk, or other subordinate officer happened to come upon the territory of the state.”¹⁶

And in a later case the Court said:

“To legalize service of process upon a foreign corporation, the circumstances must show that the persons on whom service is made has such connection either with the corporation or with the business out of which the alleged cause of action arose, that he should be considered the representative of the corporation for the purpose of service. If he had no connection with that business and no general representative character in the corporation, there is no basis for a claim that the corporation has through him been brought into court by due process of law.

“In its designation of the classes of persons on whom process against foreign corporations may be served, our statute must be construed in the light of the constitutional principle that only by due process of law can courts acquire jurisdiction over parties; and therefore, when it refers to agents, clerks and engineers, persons whose relation to a corporation may give them no representative character whatever in regard to the litigation contemplated, the courts must confine those general terms in such a way as will uphold the jurisdiction which they are asked to exercise.”¹⁷

The Supreme Court held, therefore, that the engineer of a steamboat was only a subordinate employee of the company, having no gen-

16—Camden Rolling Mill Co. v. Swede Iron Co., 32 N. J. L. 15 (1866).

17—Carroll v. New York, etc., R. R. Co., 65 N. J. L. 124 (1900); see also Norton v. Berlin Iron Bridge Co., 51 N. J. L. 442 (1889); Mulhearn v. Press Publishing Co., 53 N. J. L. 150 (1890); Saunders v. Adams Express Co., 71 N. J. L. 520 (1904).

eral charge over its corporate concerns; nor had he such connection with the business out of which the cause of action arose as might support an inference that he had authority to represent the corporation in an action for injuries sustained by plaintiff in being ejected from a train of the defendant running between New Haven and New York. The summons was delivered to the engineer on board the steamboat while she lay moored in her wharf in Jersey City.

It should be assumed, however, that when a foreign corporation, with that enactment (§ 88) before it, enters this state for the transaction of business, the person to whom it commits the management and control of that business here becomes the agent of the corporation for the purpose of receiving service of process in all actions arising in this state out of the conduct of the business. Thus, it was held that service of a summons in an action of tort, made upon the foreman of a bridge company, having a contract to put an iron roof on a building, who had charge of the work, with power to employ and discharge workmen, and pay them, he being in regular communication with the company, and having communicated the fact of the service and sent the summons to the company, the cause of action growing out of the prosecution of the agent's work, was good.¹⁸

In *Mulhearn v. Press Publishing Co.*, 53 N. J. L. 153 (1890), it was held that in an action against a New York corporation, publishing a newspaper there, service of summons in this state upon a person whose only connection with the company consists in receiving advertisements at the published rates, forwarding the same to the home office, receiving thence bills for the same and collecting them upon commission, is not a service upon an agent of the company within the meaning of section 88 of the Corporation act. The court said "The line between those who represent and those who do not represent a foreign corporation for the purposes of this act, cannot be defined by a formula. But it was never intended that every servant who happened to do some act in this state for a foreign corporation represented the company."

In an action against a foreign corporation, service of summons upon a person whose only connection with the defendant company was a contingent one that had ceased before the action was commenced, is not service on an agent of the company within the meaning of section eighty-eight of the act concerning corporations.¹⁹

Service of process on a designated agent of a foreign corporation is good, although previously the corporation, by resolution, had formally revoked the designation and sent a copy to the secretary of state, who had placed the same with the files of the company and made an entry on his docket of foreign corporations to the effect that the corporation

18—*Norton v. Berlin Iron Bridge Co.*, 51 N. J. L. 442 (1889).

19—*Hass v. Security Insurance Co.*, 57 N. J. L. 388 (1894).

had withdrawn from the state, there having been no designation of another agent.²⁰

The vice president of a foreign corporation, who comes into this state to give testimony before a commissioner of our Supreme Court, which testimony is to be used on a motion to set aside the service of a summons issued in an action against such corporation, made in this state upon a person supposed to be an agent of such corporation, is privileged from the service of a summons in another action against said corporation while he is so in attendance as a witness, and a service made upon said vice president under these circumstances will be set aside.²¹

A summons issued out of the court for the trial of small causes must be served as directed by the act, to give the justice jurisdiction. The eighty-eighth section of the corporation act, which provides for service of process on a foreign corporation, applies only to process issued out of the upper courts, and not to justices' courts.²²

In *Freeholders of Mercer v. Pennsylvania R. R. Co.*, 42 N. J. L. 490 (1880), it was held that a mandamus directed to a foreign corporation engaged in business in this state, commanding the performance of some duty growing out of that business, may be legally served upon any officer of the company in this state, upon whom lawful service could have been made, according to the ancient common law, if the corporation were domestic. Mr. Justice Dixon said: "The common law rule for serving writs of mandamus on private corporations is, that service must be made upon the head officer of the company, or upon that select body within the corporation whose province it is to put in motion the machinery necessary to secure performance of the duty commanded, or upon that superior officer who would be expected to carry out the general order of the governing body of the corporation, for the doing of the thing enjoined by the writ, the command of the writ standing for the corporate order." It was held that service made on the second vice-president, who was shown to be a salaried officer of the company, having supervision of only its financial matters, but having no power over the performance of the duty enjoined in the writ, except in the absence of the president and first vice-president, who, at the time of the service of the writ, were in the active exercise of their official functions, was insufficient. Judge Dixon also said: "So considerable are the public interests to be enforced against foreign companies in New Jersey, by means of prerogative writs, that occasion would seem to exist for legislative action, to the end that service of such writs upon these corporations might be facilitated."

This suggestion has been acted upon by the legislature.

The Corporation Act now provides (§ 102) that in any proceeding

20—*Groel v. United Electric Company of New Jersey*, 69 N. J. Eq. 397 (1905).

21—*Mulhearn v. Press Publishing Co.*, 53 N. J. L. 153 (1890).

22—*Pennsylvania R. R. Co. v. Kreitzman*, 57 N. J. L. 60 (1894).

in any court of this state against a foreign corporation requiring the use of any prerogative act, such writ may be served upon the president, vice-president, secretary or other head officer, or any director, either personally or by leaving a copy at the dwelling house or usual place of abode of such officer or director, or upon any general agent, attorney, solicitor, superintendent or manager of such corporation.

And the act further provides (§ 103) that in case any such corporation, after the service of any such writ, as aforesaid, shall neglect or refuse to make a proper return thereto, or shall neglect or refuse to obey the command of any such writ, when issued upon any judgment, order or decree of the supreme court, court of chancery, or any of the circuit courts of this state, and served as aforesaid, within the time prescribed by such writ, said court may enforce such writs by attachment or sequestration of the property, rights and credits of the corporation within this state.

A bill by a stockholder of a foreign corporation will lie against the corporation and others, where it could have sued as complainant in its own name. The corporation is a necessary party to the suit, and, as in similar actions in respect to domestic corporations, is made defendant only because controlled by the officers and directors, whose dealings with its assets are questioned by the bill.

In *Wilson v. American Palace Car Co.*, 64 N. J. Eq. 534 (1903), Vice-Chancellor Emery said: "In the present case, had I considered that there was an insuperable technical difficulty in making the Maine company a defendant, by reason of the impossibility of serving process or bringing the company into court, I should be inclined to direct that it be made a party complainant instead of defendant. But as the decree in the cause, if it should finally go for complainant, would be a decree in favor of the Maine company, I consider that company as now substantially the complainant in the suit, and that its plea to the jurisdiction cannot be sustained, except upon the theory that as against New Jersey defendants, whether individual or corporate, the stockholders of a foreign corporation cannot prosecute the company's rights in any case without the consent of those who, for the time being, control the company's formal appearance and defense. This would lead often to great inequity and injustice, and I am not willing to adopt such a rule."

It is not incumbent on a foreign corporation, complainant, to prove its corporate existence, when the answer raises no question as to its existence or right to sue, but sets up a defense on the merits alone.²³ Nor is it necessary for a foreign corporation plaintiff to aver that it is a corporation. In an early case the court said:

"If we admit the principle which is proved by the numerous authorities cited in the argument, that a foreign corporation may maintain an action in our courts, and that it is not necessary that their

²³—*Washington Life Ins. Co. v. Paterson Silk Mfg. Co.*, 25 N. J. Eq. 160 (1874).

charter should be set forth in their declaration, it remains to inquire whether they are by law required to aver that they are a legally incorporated company. No adjudged case has been referred to, nor have I been able to find one in which this has been required." It was held that it was not necessary.²⁴

To establish the legal existence of a foreign corporation formed under a general act, it is necessary to prove the laws of the state where the company was incorporated entitling the articles of incorporation to be filed or declaring that the result thereof was to create a corporation.²⁵

As to the mode of proving corporate charters generally the Supreme Court in an early case said:

"To prove that the Agricultural Bank, in the state of Massachusetts, is an incorporated bank of that state, I know of no mode by which such proof may be made, in the courts of this state, except by a copy of the charter or act of incorporation, duly certified according to the act of Congress; unless indeed by the production of a sworn copy. It is to be proved in this state, in the same manner as the statute laws of other states are always necessarily proved."²⁶

In *Edgeworth v. Wood*, 58 N. J. L. 463 (1896), it was held that the United States Express Company, a joint stock company or association, formed under the laws of the state of New York, which expressly authorize any such company or association to sue and be sued in the name of its president or of its treasurer, possessed such corporate existence and powers that it does not fall within the provisions of the supplement to the Practice act of March 23, 1890,²⁷ and that an action may be maintained against it in this state in the manner prescribed by the laws of New York, namely, in the name of its treasurer.

The provision of the Practice act (P. L. 1903, p. 597, § 230) which denies costs to a plaintiff where he does not recover above two hundred dollars exclusive of costs, except where title to land comes in question, or "where the parties to a suit, in which the amount received, exclusive of costs, exceeds one hundred dollars do not reside in the same county," applies in the case of a foreign corporation party.²⁸

128. ATTACHMENTS AND GARNISHMENT PROCEEDINGS AGAINST FOREIGN CORPORATIONS.

Attachments may issue against * * * corporations not created or recognized as corporations of this state by the laws of this state and joint stock associations.¹

In *Phillipsburg Bank v. Lackawanna R. R. Co.*, 27 N. J. L. 206

24—*Bennington Iron Company v. Rutherford*, 18 N. J. L. 105 (1840).

25—*Wooster v. Crane & Co.*, 73 N. J. Eq. 22 (1907).

26—*Stone v. The State*, 20 N. J. L. 401 (1845).

27—Now section 40 of the Practice Act of 1903; P. L. 1903, p. 537.

28—*Import Co. v. Paschall*, 60 N. J. L. 137 (1897).

1—P. L. 1901, p. 158, c. 74, § 4.

(1858), it was held, that an attachment will not lie against a foreign corporation owning property in this state, and transacting business here under legislative authority. The Court said: "But the legislature have clearly distinguished between the creation and the recognition of a corporation. The one refers clearly to a domestic corporation, having its place within this state, and subject, in all respects, to the control of its laws. The other refers to a foreign corporation, having its place within another state, deriving its being from, and subject to the control of the laws of such state, but recognized by the laws of this state, as having the power to exercise its franchises or to transact its business here."

A foreign corporation may be recognized by filing in the office of the Secretary of State a copy of its charter, a statement of its stock authorized and outstanding, the character of its business, and a designation of a principal office in this state and an agent in charge upon whom process may be served. After complying with the act in that respect, a corporation may in fact cease its business here, close its office, and its officers and directors remove from the state. Notwithstanding such facts, until the certificate from the Secretary of State is revoked, it continues to be recognized by the laws of this state as authorized to do business therein, although it may actually have become non-resident.²

Where a foreign corporation owns property in this state and transacts business here, but has not complied with the requirements under which such corporations are allowed to transact business in this state, an attachment will lie against it.³

The words "in all cases in which such writ may lawfully issue against an absconding or absent male," in the seventh section of the Attachment act, have relation to the character of the debt for which the writ shall issue, the object of the legislature being to put corporations not created or recognized by the laws of this state on the same footing as individuals who are debtors, and to make both classes subject to the writ of attachment.⁴

An action in attachment may be maintained against a foreign corporation having no office or place of business in New Jersey, which transacts no business here, when the supposed cause of action arose outside of the state and when such corporation owns real or personal property located within the state which has been attached.⁵

No distinction has been made in the construction of the Attachment act between a debt that arose within the state and one that arose out of the state.⁶

When a foreign corporation appears before a final judgment and ac-

2—Brand v. Auto Service Co., 75 N. J. L. 230 (1907); Goldmark v. Magnolia Metal Co., 65 N. J. L. 341 (1900).

3—Goldmark v. Magnolia Metal Co., 65 N. J. L. 341 (1900).

4—Goldmark v. Magnolia Metal Co., 65 N. J. L. 341 (1900).

5—Goldmark v. Magnolia Metal Co., 65 N. J. L. 341 (1900).

6—Goldmark v. Magnolia Metal Co., 65 N. J. L. 341 (1900).

cepts a declaration in the attachment suit, the effect thereof is to convert the suit into a personal action *sub modo*; such appearance supercedes the attachment so far as to enable the defendant to have the claims of the plaintiff and applying creditors litigated as if suit had been commenced by summons, but it does not destroy or impair in any way the lien created by the attachment.⁷

The rule that, in order to give a court jurisdiction in cases of foreign attachment, the res must be within the territorial jurisdiction of the court, applies only to tangible chattels capable of actual seizure and not to choses in action. Jurisdiction to fasten choses in action by garnishee process, depends upon the ability to serve process of garnishment upon the debtor of the absent defendant within the territorial jurisdiction of the court. In *National Fire Insurance Co. v. Chambers*, a Connecticut corporation doing business by agent in New Jersey and also in Pennsylvania, having voluntarily subjected itself to suit in the Pennsylvania courts, by service of process upon its agent there, became indebted to a resident of New Jersey upon a loss by fire occurring in New Jersey. A creditor of the New Jersey creditor, who resided in Massachusetts, sued out of a court of Pennsylvania a writ of foreign attachment against the resident of New Jersey, and served the same upon the agent of complainant in Pennsylvania. Afterwards the resident of New Jersey assigned his claim against complainant to another resident of New Jersey, who sued complainant in a New Jersey court of law to recover the amount due from complainant to its creditor in New Jersey. The complainant filed its bill of interpleader in the court of chancery and paid the amount of its debt into court. The Massachusetts creditor and the New Jersey assignee interpleaded. It was held that the proceedings in the Pennsylvania court gave the Massachusetts creditor a lien upon the debt superior to the right of the assignee. Vice-Chancellor Pitney held that a corporation is capable of having several domiciles and of being sued at the same time in more than one jurisdiction. The contrary doctrine advanced and acted upon by the court in *Douglass v. Phoenix Insurance Co.*, 138 N. Y. 209, was examined and repudiated.⁸

A foreign corporation which has no agent in the state upon whom process can be served is liable to process of garnishee under the Attachment act and a debt due it from a New Jersey corporation may be attached by the service of process upon the registered agent of the New Jersey corporation.⁹

129. JURISDICTION OF COURT OF CHANCERY TO APPOINT RECEIVER OF A FOREIGN CORPORATION.

In *Minchin v. Second National Bank*, 36 N. J. Eq. 436 (1883), it was held that a receiver of a foreign corporation may be appointed under

7—*Goldmark v. Magnolia Metal Co.*, 65 N. J. L. 341 (1900).

8—*National Fire Ins. Co. v. Chambers*, 53 N. J. Eq. 468 (1895).

9—*Franklyn v. Taylor Hydraulic, etc., Co.*, 68 N. J. L. 113 (1902).

the provisions of the Corporation Act by virtue of that section of the act which subjects foreign corporations doing business in this state to all the provisions of the act so far as applicable.

To authorize the court to appoint a receiver of an insolvent corporation, it is not necessary that the corporation shall be engaged in carrying on its business in this state on the very day when the bill or petition is filed, but the court may take jurisdiction in any case where it is made to appear that the corporation has done business here, and still has property here, although at the time when the bill or petition is filed, its business here is entirely suspended. The obvious design of the statute is to give the creditors of any foreign corporation, which, having done business in this state, becomes insolvent and has property here which should be administered for the benefit of its creditors, the same remedy against a corporation, in respect to its property here, that it gives to the creditors of an insolvent domestic corporation.¹

130. RIGHTS OF FOREIGN RECEIVERS.

Independent of statutory provision, but simply as a matter of comity, the court of chancery will extend its aid to the receiver of a foreign corporation, for the purpose of enabling him to get the possession of the property which should, in equity, be applied in payment of its debts. The court said: "By express provision, foreign corporations, doing business in this state, are made subject to all the provisions of our statute concerning corporations, so far as the same can be applied to foreign corporations. The design of this enactment seems to me to be very plain. The legislative design was, unquestionably, to confer upon this court the same powers, in respect to insolvent corporations, created by foreign jurisdictions, having property in this state, that it exercised over insolvent domestic corporations, so far, at least, as the exercise of such powers was necessary to the recovery of any assets, whether legal or equitable, which should go in discharge of debts. Under this statute, I think this court may appoint a receiver auxiliary to the proceeding instituted against a foreign corporation, in the state which created it, and may properly invest him with the same powers, so far as they are necessary to the collection and recovery of its assets, that it is authorized to grant to the receiver of a domestic corporation. And I think it is bound, not only in virtue of this statute, but by the principles of a just comity, to extend to him the same remedies and rules of judgment, in the recovery of the assets of the corporation, that it would give to the receiver of a domestic corporation."¹

"On principles of comity, the aid of this court will be extended to a receiver of a foreign corporation seeking to obtain possession of prop-

¹—*Albert v. Clarendon Land Investment & Agency Co.*, 53 N. J. Eq. 623 (1895).

¹—*National Trust Company v. Miller*, 33 N. J. Eq. 155 (1880).

erty of the corporation here, as against the officers of the company who may be endeavoring, by fraud or subterfuge, to withhold it. To such a suit the corporation is not a necessary party.”²

“In view of these considerations and authorities my conclusion is, that the legal effect of the appointment of a receiver in a foreign jurisdiction in transferring to him the right to collect the property passing under his control by virtue of such office, will be so far recognized by the courts of this state as to enable such officer to sustain a suit for the recovery of such property.”³

It is necessary, in a suit by a receiver appointed by a court of another state, to show in the declaration the grounds of his right to sue officially. “This court cannot tell what are the powers of a receiver who has been created by a judicial order of a New York court. That is a question depending entirely on the law by force of which such appointment has been made. I question much whether the extent of the functions of a common law receiver could be judicially noticed, as the authority of such officers is not of uniform capacity, being graduated to the occasion.”⁴

The Pennsylvania Steel Company, a Pennsylvania corporation, became insolvent, and receivers were appointed by a court of that state. They took into their possession all the assets, of every description, belonging to that corporation. They subsequently made a contract with a New Jersey corporation to manufacture for and deliver to it certain articles and in pursuance thereof, they did furnish and deliver, prior to the levy of attachment in New Jersey, a portion of said articles. A foreign corporation, the Merchants' National Bank of Boston, residing in Massachusetts, thereupon and after the passage of the supplement to the Attachment act of May 9th, 1894, sued out a writ of attachment in this state against the Pennsylvania insolvent corporation, and attached thereunder the moneys due to the receivers under said contract, and also part of the rails that had been theretofore delivered by said receivers to the New Jersey corporation, under said contract. The Boston bank knew that the receivers had entered upon the discharge of their duties, and it had collected from said receivers interest on notes of the insolvent company, which it held at the date of the appointment of said receivers or on renewals thereof made at its request. It was held that there were no property or assets in existence in this state which the Boston bank could attach as the property of the insolvent Pennsylvania corporation; all its assets having passed into the hands of the receivers, that the money due under the contract made by the receivers with the New Jersey corporation belonged to said receivers, in trust, for the benefit of the creditors and stockhold-

2—*Bidlack v. Mason*, 26 N. J. Eq. 230 (1875); see also *Sobernheimer v. Wheeler*, 45 N. J. Eq. 614 (1889).

3—*Beasley, C. J.*, in *Hurd v. City of Elizabeth*, 41 N. J. L. 1 (1879); see also *Knapp v. Hoboken*, 38 N. J. L. 37 (1876).

4—*Hurd v. City of Elizabeth*, 40 N. J. L. 218 (1879).

ers of the Pennsylvania corporation. It was further held that the attachment should be set aside and vacated, as there was no property of the defendant corporation to attach when the same was issued, and because the attachment interfered with the proper administration of the trust fund by the receivers, under the orders of the Pennsylvania court. It was further held that, as there is no statute in this state to prevent such action, and no rights of domestic creditors involved, comity calls upon this court to protect the rights of the receivers acting under the direction of and as officers of the Pennsylvania court, by vacating this attachment against the insolvent Pennsylvania corporation.⁵

⁵—Merchants' National Bank v. Pennsylvania Steel Co., 57 N. J. L. 336 (1894).

PART II.

TEXT OF STATUTES RELATING TO THE INCORPORATION, MANAGEMENT, REGULATION AND TAXATION OF CORPORATIONS.

PART II.

TEXT OF STATUTES.

PROVISIONS OF THE CONSTITUTION OF THE STATE OF NEW JERSEY, AS AMENDED IN 1875, RESPECTING CORPORATIONS.

ARTICLE I.

19. No county, city, borough, town, township or village shall hereafter give any money or property, or loan its money or credit to or in aid of any individual, association or corporation, or become security for or be directly or indirectly the owner of any stock or bonds of any association or corporation.

20. No donation of land or appropriation of money shall be made by the state or any municipal corporation to or for the use of any society, association or corporation whatever.

ARTICLE IV.

Section VII.

3. The legislature shall not pass any * * * law impairing the obligation of contracts or depriving a party of any remedy for enforcing a contract which existed when the contract was made.

8. Individuals or private corporations shall not be authorized to take private property for public use without just compensation first made to the owners.

11. The legislature shall not pass private, local or special laws in any of the following enumerated cases, that is to say. * * * Granting to any corporation, association or individual, any exclusive privilege, immunity or franchise whatever. Granting to any corporation, association or individual the right to lay down railroad tracks * * * The legislature shall pass general laws providing for the cases enumerated in this paragraph, and for

all other cases which, in its judgment, may be provided for by general laws. The legislature shall pass no special act conferring corporate powers, but they shall pass general laws under which corporations may be organized and corporate powers of every nature obtained, subject, nevertheless, to repeal or alteration at the will of the legislature.

ARTICLE X.

1. All * * * claims and rights of individuals and bodies corporate, and of the state, and all charters of incorporation shall continue.

A. GENERAL INCORPORATION ACTS.

1. GENERAL CORPORATION ACT AND SUPPLEMENTS, AND ACTS REGULATING COMPANIES FORMED UNDER THE GENERAL CORPORATION ACT.

AN ACT CONCERNING CORPORATIONS (REVISION OF 1896).¹

Be it enacted by the Senate and General Assembly of the State of New Jersey:

I. POWERS.

1. General powers incident to all corporations. Every corporation shall have power:

I. To have succession, by its corporate name, for the period limited in its charter or certificate of incorporation, and when no period is limited, perpetually;

II. To sue and be sued in any court of law or equity;

III. To make and use a common seal, and alter the same at pleasure;

IV. To hold, purchase and convey such real and personal estate as the purposes of the corporation shall require, and all other real estate which shall have been bona fide conveyed or mortgaged to the said corporation by way of security, or in satisfaction of debts, or purchased at sales upon judgment or decree obtained for such debts; and to mortgage any such real or personal estate with its franchises; the power to hold real and personal estate shall include the power to take the same by devise or bequest;

V. To appoint such officers and agents as the business of the corporation shall require, and to allow them suitable compensation;

VI. To make by-laws fixing and altering the number of its directors, and providing for the management of its property, the regulation and government of its affairs, and the transfer of its stock, with penalties for the breach thereof not exceeding twenty dollars;

VII. To wind up and dissolve itself, or be wound up and dissolved in manner hereafter mentioned.

2. Additional powers granted by this act; application of act; limitation of powers. In addition to the powers enumerated in the first section of this act and the powers specified in its charter or in the act or certificate under which it was incorporated, every corporation, its officers, directors and stockholders, shall possess and exercise all the powers and privileges contained in this act, so far as the same are necessary or convenient to the attainment of the objects set forth in such charter or certificate of incorporation; and shall be governed by the provisions and be subject to the restrictions and liabilities in this act contained, so far as the same are appropriate to and not inconsistent with such charter or the act under which such corporation was formed; and no corporation shall possess or exercise any other corporate powers, except such incidental powers as shall be necessary to the exercise of the powers so given.

3. Banking powers not to be possessed by corporations organized under this act. No corporation created or to be created under the provisions of this act shall, by any implication or construction, be deemed to possess the power of carrying on the business of discounting bills, notes or other evidences of debt, or of receiving deposits of money, of buying gold or silver bullion or foreign coins, or of buying and selling bills of exchange, or of issuing bills, notes or other evidences of debt, upon loan or for circulation as money. (As amended by P. L. 1899, p. 473, c. 176.)

¹—Approved April 16, 1896; P. L. 1896, p. 277, c. 185.

4. All charters subject to legislative alteration, etc. The charter of every corporation, or any supplement thereto or amendment thereof, shall be subject to alteration, suspension and repeal, in the discretion of the legislature, and the legislature may at pleasure dissolve any corporation.

5. This act subject to amendment; to be part of charter of every corporation. This act may be amended or repealed, at the pleasure of the legislature, and every corporation created under this act shall be bound by such amendment; but such amendment or repeal shall not take away or impair any remedy against any such corporation or its officers for any liability which shall have been previously incurred; this act and all amendments thereof shall be a part of the charter of every corporation heretofore or hereafter formed hereunder, except so far as the same are inapplicable and inappropriate to the objects of such corporation.

II. FORMATION, CONSTITUTION, ALTERATION, DISSOLUTION.

6. Purposes for which corporations may be formed under this act. Upon executing, recording and filing a certificate pursuant to all the provisions of this act, three or more persons may become a corporation for any lawful purpose or purposes whatever, other than a savings bank, a building and loan association, an insurance company, a surety company, a railroad company, a telegraph company, a telephone company, canal company, a turnpike company, or other company which shall need to possess the right of taking and condemning lands in this State, or other than a corporation provided for by "An act concerning banks and banking (Revision of 1899)," or by "An act concerning trust companies (Revision of 1899)," or by "An act concerning safe deposit companies (Revision of 1899)." It shall, however, be lawful to form a company hereunder for the purpose of constructing, maintaining and operating railroads, telephone or telegraph lines outside of this State; provided, that any company organized under the provisions of this act for cremation purposes shall, before beginning business, file a certified copy of its certificate of incorporation with the State Board of Health and obtain from said board a license to carry on said business, under such rules and regulations as said board may prescribe. (As amended by P. L. 1907, p. 35, c. 12.)

7. Any corporation may conduct business outside of the state. Any corporation of this state, heretofore or hereafter organized under the laws of this state, may conduct business, have one or more offices, and hold, purchase, mortgage and convey real and personal property outside of this state in any of the several states, territories, possessions and dependencies of the United States, the District of Columbia, and in foreign countries; provided, such powers are included within the objects set forth in its certificate of incorporation or charter. (As amended by P. L. 1905, p. 515, c. 263.)

8. Mode of execution of certificate of incorporation; contents. The certificate of incorporation shall be signed in person by all the subscribers to the capital stock named therein, and shall set forth:

I. The name of the corporation; no name shall be assumed already in use by another existing corporation of this state, or so nearly similar thereto as to lead to uncertainty or confusion;

II. The location (town or city, street and number, if number there be) of its principal office in the state;

III. The object or objects for which the corporation is formed;

IV. The amount of the total authorized capital stock of the corporation, which shall not be less than two thousand dollars, the number of shares into which the same is divided and the par value of each share; the amount of capital stock with which it will commence business, which

shall not be less than one thousand dollars; and, if there be more than one class of stock created by the certificate of incorporation, a description of the different classes, with the terms on which the respective classes of stock are created;

V. The names and post-office address of the incorporators and the number of shares subscribed for by each; the aggregate of such subscriptions shall be the amount of capital stock with which the company will commence business, and shall be at least one thousand dollars;

VI. The period, if any, limited for the duration of the company;

VII. The certificate of incorporation may also contain any provision which the incorporators may choose to insert, for the regulation of the business and for the conduct of the affairs of the corporation, and any provision creating, defining, limiting and regulating the powers of the corporation, the directors and the stockholders, or any class or classes of stockholders; provided, such provision be not inconsistent with this act. (As amended by P. L. 1898, p. 407, c. 172.)

9. Certificate of incorporation to be recorded and filed; certified copy evidence. The certificate of incorporation shall be proved or acknowledged as required for deeds of real estate, and recorded in a book to be kept for that purpose in the office of the clerk of the county where the principal office of such corporation in this state shall be established, and, after being so recorded, shall be filed in the office of the secretary of state; said certificate, or a copy thereof duly certified by the secretary of state, shall be evidence in all courts and places.

10. Upon filing and recording certificate of incorporation persons associating to be body corporate. Upon making the certificate of incorporation and causing the same to be recorded and filed as aforesaid, the persons so associating, their successors and assigns, shall, from the date of such filing, be and constitute a body corporate by the name set forth in said certificate, subject to dissolution as in this act elsewhere provided.

11. Power to make and alter by-laws. The power to make and alter by-laws shall be in the stockholders, but any corporation may, in the certificate of incorporation, confer that power upon the directors; by-laws made by the directors under power so conferred may be altered or repealed by the stockholders.

12. Business to be managed by board of directors; qualification, number, mode of choosing, term of office, classification and residence of directors. The business of every corporation shall be managed by its directors, who shall respectively be shareholders therein; they shall be not less than three in number, and, except as hereinafter provided, they shall be chosen annually by the stockholders at the time and place provided in the by-laws, and shall hold office for one year and until others are chosen and qualified in their stead; but by so providing in its certificate of incorporation, any corporation organized under this act may classify its directors in respect to the time for which they shall severally hold office, the several classes to be elected for different terms; provided, that no class shall be elected for a shorter period than one year or for a longer period than five years, and that the term of office of at least one class shall expire in each year; any corporation which shall have more than one kind of stock, may, by so providing in its certificate of incorporation, confer the right to choose the directors of any class upon the stockholders of any class or classes, to the exclusion of the others; one director of every corporation of this state shall be an actual resident of this state, and it shall not be necessary for more than one director to be a resident of this state, notwithstanding the provisions of any special charter or other act.

13. President, secretary and treasurer; how chosen; qualification. Every corporation organized under this act shall have a president, secre-

tary and treasurer, who shall be chosen either by the directors or stockholders, as the by-laws may direct, and shall hold their offices until others are chosen and qualified in their stead; the president shall be chosen from among the directors; the secretary shall be sworn to the faithful discharge of his duty, and shall record all the votes of the corporation and directors in a book to be kept for that purpose, and perform such other duties as shall be assigned to him; the treasurer shall give bond in such sum, and with such surety or sureties, as shall be required by the by-laws, for the faithful discharge of his duty.

14. Other officers and agents. The corporation may have such other officers, agents and factors, who shall be chosen in such manner and hold their office for such terms as may be prescribed by the by-laws.

15. Mode of filling vacancies. Any vacancy occurring among the directors or in the office of president, secretary or treasurer by death, resignation, removal or otherwise, shall be filled in the manner provided for in the by-laws; in the absence of such provision such vacancies shall be filled by the board of directors.

16. First meeting of corporation; waiver of notice and statutory requirements in respect to corporate meetings. The first meeting of every corporation shall be called by a notice, signed by a majority of the incorporators, designating the time, place and purpose of the meeting, which notice shall be published at least two weeks before the meeting in some newspaper of the county where the corporation is established; or said first meeting may be called without publication if two days' notice be personally served on all the incorporators; or if all the incorporators shall, in writing, waive notice and fix a time and place of meeting, no notice or publication shall be required; whenever under any of the provisions of this act, or any amendment thereto, a corporation is authorized to take any action after notice to its members or stockholders, or after the lapse of a prescribed period of time, such action may be taken without notice and without the lapse of any period of time, if such action be authorized or approved and such requirements be waived, in writing, by every member or stockholder of such corporation or by his attorney thereunto authorized. (As amended by P. L. 1902, p. 217, c. 58.)

17. Absent stockholders may vote by proxy; calling and conduct of meetings; quorum, etc. Absent stockholders may vote at all meeting by proxy in writing; and every corporation may determine by its certificate of incorporation or by-laws the manner of calling and conducting all meetings, what number of shares shall entitle the stockholders to one or more votes, what number of stockholders shall attend, either in person or by proxy, or what number of shares or amount of interest shall be represented at any meeting in order to constitute a quorum, and may by its original or amended certificate of incorporation provide that any action which now requires the consent of the holders of two-thirds of the stock at any meeting after notice to them given, or requires their consent in writing to be filed, may be taken upon the consent of and the consent given and filed by the holders of two-thirds of the stock of each class represented at such meeting in person or by proxy; provided, in no case shall more than a majority of shares or amount of interest be required to be represented at any meeting in order to constitute a quorum; if the quorum shall not be so determined by the corporation, a majority in interest of the stockholders, represented either in person or by proxy, shall constitute a quorum. (As amended by P. L. 1901, p. 260, c. 119; approved March 22, 1901.)

18. Preferred and other special classes of stock. Every corporation organized under this act shall have power to create two or more kinds of stock, of such classes, with such designations, preferences and voting powers or restrictions or qualifications thereof as shall be stated and

expressed in the certificate of incorporation or in any certificate of amendment thereof, and the power to increase or decrease the stock as in this act elsewhere provided shall apply to all or any of the classes of stock; but at no time shall the total amount of the preferred stocks issued and outstanding exceed two-thirds of the capital stock paid for in cash or property, and such preferred stocks may, if desired, be made subject to redemption at any time after three years from the issue thereof, at a price not less than par, and the holders thereof shall be entitled to receive, and the corporation shall be bound to pay thereon, dividends at such rates and on such conditions as shall be stated in the original or amended certificate of incorporation, not exceeding eight per centum per annum, payable quarterly, half yearly or yearly; and such dividends may be made payable before any dividends shall be set apart or paid on the common stock, and such dividends may be made cumulative; provided, the corporation shall set apart or pay the said dividends to the holders of non-cumulative preferred stock before any dividend shall be paid on the common stock; and in no event shall a holder of preferred stock be personally liable for the debts of the corporation; but in case of insolvency its debts or other liabilities shall be paid in preference to the preferred stock; the terms "general stock" and "common stock" are synonymous. (As amended by P. L. 1901, p. 245, c. 110.)

19. Certificates of stock. Every stockholder shall have a certificate, signed by the president and treasurer, certifying the number of shares owned by him in such corporation.

20. Nature of shares of stock; how transferred. The shares of stock in every corporation shall be personal property, and shall be transferable on the books of the corporation in such manner and under such regulations as the by-laws provide; and whenever any transfer of shares shall be made for collateral security, and not absolutely, it shall be so expressed in the entry of the transfer.

21. Liability of stockholders. Where the whole capital of a corporation shall not have been paid in, and the capital paid shall be insufficient to satisfy its debts and obligations, each stockholder shall be bound to pay on each share held by him the sum necessary to complete the amount of such share, as fixed by the charter of the corporation, or such proportion of that sum as shall be required to satisfy such debts and obligations.

22. Mode of making assessments on stock; notice of assessment. The directors of every corporation may, from time to time, make assessments upon the shares of stock subscribed for, not exceeding, in the whole, the par value thereof; and the sums so assessed shall be paid to the treasurer at such times and by such installments as the directors shall direct, said directors having given thirty days' notice of the assessment and of the time and place of payment either personally or by mail or by publication in a newspaper published in the county where the corporation is established.

23. Sale of shares for non-payment of assessment. If the owner of any shares shall neglect to pay any sum assessed thereon for thirty days after the time appointed for payment, the treasurer, when ordered by the board of directors, shall sell, at public auction, such number of the shares of the delinquent owner as will pay all assessments then due from him, with interest, and all necessary incidental charges, and shall transfer the shares sold to the purchaser, who shall be entitled to a certificate therefor.

24. Proceedings for sale of shares for non-payment of assessment. The treasurer shall give notice of the time and place appointed for the sale, and of the sum due on each share, by advertising the same three weeks successively, once in each week, before the sale, in some news-

paper published in the county where the corporation is established, and by mailing a notice thereof to the delinquent stockholder, if he knows his post-office address.

25. Certificate of payment of capital stock. The president and secretary, or treasurer, upon payment of each installment of capital stock, and of every increase thereof, shall make a certificate, stating the amount of the capital so paid, and whether paid in cash or by the purchase of property, stating also the total amount of capital stock, if any, previously paid and reported; which certificate shall be signed and sworn to by the president and secretary or treasurer, and they shall, within ten days after such payment, cause the certificate to be filed in the office of the secretary of state.

26. Liability of officers for neglect to make and file certificate of payment of capital stock. If any of said officers shall neglect or refuse to perform the duties required of them in the preceding section for thirty days after written request so to do by a creditor or stockholder of the corporation, they shall be jointly and severally liable for all its debts contracted before the filing of such certificate.

27. Charter amendments by corporations organized under this act. Every corporation organized under this act may change the nature of its business, change its name, increase its capital stock, decrease its capital stock, change the par value of the shares of its capital stock, change the location of its principal office in this state, extend its corporate existence, change its common stock into one or more classes of preferred stock, create one or more classes of preferred stock, and make such other amendment, change or alteration as may be desired in manner following: the board of directors shall pass a resolution declaring that such change or alteration is advisable and calling a meeting of the stockholders to take action thereon. The meeting shall be held upon such notice as the by-laws provide, and in the absence of such provision, upon ten days' notice, given personally or by mail. If two-thirds in interest of each class of the stockholders having voting powers shall vote in favor of such amendment, change or alteration, a certificate thereof shall be signed by the president and secretary under the corporate seal, acknowledged or proved as in the case of deeds of real estate, and such certificate together with the written assent, in person or by proxy, of two-thirds in interest of each class of such stockholders, shall be filed in the office of the secretary of state, and upon the filing of the same, the certificate of incorporation shall be deemed to be amended accordingly; provided, that such certificate of amendment, change or alteration shall contain only such provision as it would be lawful and proper to insert in an original certificate of incorporation made at the time of making such amendment, and the certificate of the secretary of state that such certificate and assent have been filed in his office shall be taken and accepted as evidence of such change or alteration in all courts and places. (As amended by P. L. 1908, p. 127, c. 84.)

28. Charter amendments by corporations organized under other acts. Any corporation of this state whether organized under a special act of incorporation or under general laws, excepting railroad and canal corporations, and other corporations possessing the right of taking and condemning lands, may increase or decrease its capital stock, change its name, the par value of the shares of its capital stock, or the location of its principal office in or out of this state, change its common stock into one or more classes of preferred stock, create one or more classes of preferred stock, and fix any method of altering its by-laws permitted by the act to which this is a supplement, in the manner prescribed in the foregoing section, and any corporation may, in the same manner, relinquish one or more branches of its business, or extend its business to such

branches as might have been inserted in its original certificate of incorporation. (As amended by P. L. 1908, p. 127, c. 84, which provides that "nothing herein shall be construed to amend, alter or modify the provisions of section 18 of the 'Act concerning corporations [Revision of 1896]'.")

29. How decrease of capital stock may be effected; publication of certificate; liability of directors; effect of decrease. The decrease of capital stock may be effected by retiring or reducing any class of the stock, or by drawing the necessary number of shares by lot for retirement, or by the surrender by every shareholder of his shares, and the issue to him in lieu thereof of a decreased number of shares, or by the purchase at not above par of certain shares for retirement, or by retiring shares owned by the corporation or by reducing the par value of shares; and when any corporation shall decrease the amount of its capital stock hereinbefore provided, the certificate decreasing the same shall be published for three weeks successively, at least once in each week, in a newspaper published in the county in which the principal office of the corporation is located; the first publication to be made within fifteen days after the filing of such certificate, and in default thereof the directors of the corporation shall be jointly and severally liable for all debts of the corporation contracted before the filing of the said certificate, and the stockholders shall also be liable for such sums as they may respectively receive of the amount so reduced; provided, no such decrease of capital stock shall release the liability of any stockholder, whose shares have not been fully paid, for debts of the corporation theretofore contracted, nor effect any reduction of the taxes that may be required to be paid by the charters of corporations incorporated by special acts.

30. Unlawful reductions of capital and unlawful dividends; liability of directors. The directors of a corporation shall not make dividends except from its surplus, or from the net profits arising from the business of such corporation, nor shall it divide, withdraw, or in any way pay to the stockholders or any of them, any part of the capital stock of such corporation, or reduce its capital stock except as authorized by law; in case of any wilful or negligent violation of the provisions of this section, the directors under whose administration the same may have happened, except those who may have caused their dissent therefrom to be entered at large upon the minutes of such directors at the time, or who not then being present, shall have caused their dissent therefrom to be so entered upon learning of such action, shall jointly and severally be liable at any time within six years after paying such dividend, to the stockholders of such corporation, severally and respectively, to the full amount of any loss sustained by such stockholders or in case of insolvency to the corporation or its receiver to the full amount of any loss sustained by the corporation, by reason of such withdrawal, division or reduction. (As amended by P. L. 1904, p. 275, c. 143, which provides that "This act shall take effect immediately, but shall not affect any action or proceeding pending in any court at the time it takes effect, or any right of any corporation, or of any creditor or stockholder of any corporation, against any director under existing law.")

31. How corporation may be dissolved. Whenever, in the judgment of the board of directors, it shall be deemed advisable and most for the benefit of such corporation that it should be dissolved, the board, within ten days after the adoption of a resolution to that effect by a majority of the whole board at any meeting called for that purpose, of which meeting every director shall have received at least three days' notice, shall cause notice of the adoption of such resolution to be mailed to each stockholder residing in the United States, and also beginning within said ten days cause a like notice to be published in a newspaper published in

the county wherein the corporation shall have its principal office, at least four weeks successively, once a week, next preceding the time appointed for the same, of a meeting of the stockholders to be held at the office of the corporation, to take action upon the resolutions so adopted by the board of directors, which meeting shall be held between the hours of ten o'clock in the forenoon and three o'clock in the afternoon of the day so named, and which meeting may, on the day so appointed, by consent of a majority in interest of the stockholders present, be adjourned from time to time for not less than eight days at any one time, of which adjourned meeting notice by advertisement in said newspaper shall be given; and if at any such meeting two-thirds in interest of all the stockholders shall consent that a dissolution shall take place and signify their consent in writing, such consent, together with a list of the names and residences of the directors and officers, certified by the president and the secretary or treasurer, shall be filed in the office of the secretary of state, who, upon being satisfied by due proof that the requirements aforesaid have been complied with, shall issue a certificate that such consent has been filed, and the board of directors shall cause such certificate to be published four weeks successively, at least once a week, in a newspaper published in said county; and upon the filing in the office of the secretary of state of an affidavit that said certificate has been so published, the corporation shall be dissolved and the board shall proceed to settle up and adjust its business and affairs; whenever all the stockholders shall consent in writing to a dissolution, no meeting or notice thereof shall be necessary, but on filing said consent in the office of the secretary of state he shall forthwith issue a certificate of dissolution, which shall be published as above provided.

32. Incorporators may surrender corporate rights and franchise. The incorporators named in any certificate of incorporation, before the payment of any part of the capital, and before beginning the business for which the corporation was created, may surrender all their corporate rights and franchises, by filing in the office of the secretary of state a certificate, verified by oath, that no part of the capital has been paid and such business has not been begun, and surrendering all rights and franchises, and thereupon the said corporation shall be dissolved.

III. ELECTIONS; STOCKHOLDERS' MEETINGS.

33. Stock and transfer books to be kept at registered office open to examination of stockholders; list of stockholders; penalties. Every corporation shall keep at its principal and registered office in this state the transfer books in which the transfer of stock shall be registered, and the stock books, which shall contain the name and address of the stockholders, the number of shares held by them respectively, which shall at all times during the usual hours for business be open to the examination of every stockholder; the directors shall cause the secretary, or other officer designated by them having charge of said books, to make, at least ten days before every election after the first election, a full, true and complete list, in alphabetical order, of all the stockholders entitled to vote at the ensuing election, with the residence of each, and the number of shares held by each, which list shall at all times during the usual hours for business be kept at such principal and registered office, and open to the examination of any stockholder at said office, and if any officer having charge of such books or list shall, upon demand by any stockholder, refuse or neglect to exhibit such books or list, or submit them to examination as aforesaid, he shall for every such offense forfeit the sum of two hundred dollars, one-half thereof to the use of the state of New Jersey and the other half to him who will sue for the same, to be re-

covered by action of debt in any court of record, together with costs of suit, and the books aforesaid shall be the only evidence as to who are the stockholders entitled to examine such books or list, and to vote at such election; and the board of directors shall produce at the time and place of such election such books and list, there to remain during the election, and the neglect or refusal of said directors to produce the same shall render them ineligible to any office at such election. (As amended by P. L. 1898, p. 407, c. 172.)

34. Elections of directors. All elections for directors shall be by ballot, unless otherwise expressly provided in the charter or certificate of incorporation; the poll at every such election shall be opened between the hours of nine o'clock in the morning and five o'clock in the afternoon, and shall close before nine o'clock in the evening; the same shall remain open at least one hour, unless all the stockholders are present in person or by proxy and have sooner voted, or unless all the stockholders waive this provision in writing; the persons receiving the greatest number of votes shall be the directors; provided, however, that unless otherwise provided in the original or amended certificate of incorporation, or in the by-laws approved at a stockholders' meeting, in all corporations formed under the provisions of this act, a majority in interest of all the stockholders shall be present in person or by proxy to constitute a quorum. (As amended by P. L. 1902, p. 201, c. 52.)

35. No candidate for office of director to act as judge, etc., of election. No person who is a candidate for the office of director shall act as judge, inspector or clerk of any election for directors; and if any candidate shall so act and be elected, his election shall be void, and the directors shall not appoint such person a director within twelve months next succeeding; this section shall not apply to the first election of directors.

36. Voting rights of stockholders at elections of directors; proxies. Unless otherwise provided in the charter, certificate or by-laws of the corporation, at every election each stockholder, whether resident or non-resident, shall be entitled to one vote in person or by proxy for each share of the capital stock held by him, but no proxy shall be voted on after three years from its date; nor shall any share of stock be voted on at any election which has been transferred on the books of the corporation within twenty days next preceding such election.

37. Persons holding stock in representative or fiduciary capacity may vote; voting upon pledged stock. Every person holding stock as executor, administrator, guardian or trustee, or any other representative or fiduciary capacity, may represent the same at all meetings of the corporation, and may vote thereon as a stockholder, and every person who shall pledge his stock as collateral security may, nevertheless, represent the same at all such meetings, and may vote thereon as a stockholder, unless in the transfer to the pledgee on the books of the corporation he shall have expressly empowered the pledgee to vote thereon, in which case only the pledgee or his proxy may represent said stock and vote thereon.

38. Stock owned by corporation not to be voted. Shares of stock of a corporation belonging to said corporation shall not be voted upon directly or indirectly.

39. Directors to be stockholders. No person shall be elected a director of any corporation issuing stock unless he shall be, at the time of his election, a bona fide holder of some of the stock thereof; and any director ceasing to be a bona fide holder of some of the stock thereof shall cease to be a director; any corporation may, by its certificate of incorporation or by-laws, determine how many shares a person shall hold to qualify him to be a director.

40. Transfer books to determine who are stockholders entitled to vote. In case the right to vote upon any share of stock shall be questioned, the inspectors of the election shall refer to the stock books of the corporation to ascertain who are the stockholders, and in case of a discrepancy between the books, the transfer book shall control and determine who are entitled to vote.

41. Proceedings in case election not held on designated day. If the election for directors of any corporation shall not be held on the day designated by the act or certificate of incorporation or by-laws, the directors shall cause the election to be held as soon thereafter as conveniently may be; no failure to elect directors at the designated time shall work any forfeiture or dissolution of the corporation, but any justice of the supreme court may summarily order an election to be held upon the application of any stockholder, and may punish the directors for contempt of court for failure to obey the order.

42. Summary proceeding in supreme court to review elections, etc. The supreme court, upon application of any person who may be aggrieved by or complain of any election, or any proceeding, act or matter in or touching the same, reasonable notice having been given to the adverse party, or to those who are to be affected thereby, of such intended application, shall proceed forthwith, and in a summary way hear the affidavits, proofs and allegations of the parties, or otherwise inquire into the matter or causes of complaint, and thereupon establish the election so complained of, or order a new election, or make such order, and give such relief in the premises as right and justice may require; the court may, if the case require it, either order an issue to be made up in manner and form as it may direct, to try the rights of the respective parties to the office or franchise in question, or may give leave to exhibit, or direct the attorney-general to exhibit, an information in the nature of a quo warranto in relation thereto.

43. Annual report to be filed in office of secretary of state. Every domestic corporation and every foreign corporation doing business within this state, shall file in the office of the secretary of state within thirty days after the first election of directors and officers and annually thereafter within thirty days after the time appointed for holding the annual election of directors, a report authenticated by the signatures of the president and one other officer, or by any two directors of the company, stating:

I. The name of the corporation;

II. The location (town or city, street and number, if number there be) of its registered office in this state, and the name of the agent upon whom process against the corporation may be served;

III. The character of its business;

IV. The amount of its authorized capital stock, if any, and the amount actually issued and outstanding;

V. The names and addresses of all the directors and officers of the company and when the term of office of each expires;

VI. The date appointed for the next annual meeting of the stockholders for the election of directors;

VII. Whether the name of such corporation has been at all times displayed at the entrance of its registered office in this state, and whether such corporation has kept at this registered office in this state a transfer book in which the transfers of stock are made, and a stock book containing the names and addresses of the stockholders and the number of shares held by them respectively, open at all times to the examination of the stockholders as required by law; provided, however, that the requirement of this subdivision shall not apply to foreign cor-

porations nor to any railroad or canal corporation; and further provided, that no part of this section shall apply to corporations as are now by law under the supervision of the department of banking and insurance; if such report is not so made and so filed the corporation shall forfeit to the state two hundred dollars, to be recovered with costs in an action of debt, to be prosecuted by the attorney-general, who shall prosecute such actions whenever it shall appear that this section has been violated; and further provided, if such report be not so made and filed, all of the directors of any such domestic corporation who shall willfully refuse to comply with the provisions hereof and who shall be in office during the default shall at the time appointed for the next election, and for a period of one year thereafter, be thereby rendered ineligible for election or appointment to any office in the company as directors or otherwise; no director shall be thus disqualified for the failure to make and file such report if he shall file with the secretary of state before the time appointed for holding the next election of directors after said default, a certificate stating that he has endeavored to have such report made and filed, but that the officers have neglected to make and file the same, and shall report the items required to be stated in such annual report so far as they are within his knowledge or are obtainable from sources of such information open to him, verified by him to be true to the best of his knowledge, information and belief; the secretary of state shall upon application furnish blanks in proper form and shall safely keep in his office all such reports and shall prepare an alphabetical index thereof, which reports and index shall be open to the inspection of all persons at proper hours. (As amended by P. L. 1900, p. 313, c. 124, § 1.)

2. In case any domestic corporation, or any foreign corporation authorized to transact business in this state, shall fail to file such report within the time required by this section, or in case the agent of any such corporation designated by any such corporation as the agent upon whom process against the corporation may be served shall die, or shall resign, or shall remove from the state, or such agent cannot with due diligence be found, it shall be lawful, while such default continues, to serve process against any such corporation upon the secretary of state, and such service shall be as effective to all intents and purposes as if made upon the president or head officer of such corporation, and within two days after such service upon the secretary of state as aforesaid, it shall be the duty of the secretary of state to notify such corporation thereof by letter directed to such corporation at its registered office, in which letter shall be inclosed a copy of the process or other paper served, and it shall be the duty of the plaintiff in any action in which said process shall be issued to pay to the secretary of state, for the use of the state, the sum of three dollars, which said sum shall be taxed as a part of the taxable costs in said suit if the plaintiff prevails therein; the secretary of state shall keep a book to be called the "process book," in which shall be recorded alphabetically, by the name of the plaintiff and defendant therein, the title of all causes in which processes have been served upon him, the test of the process so served and the return day thereof, and the date and hour when such service was made.

3. The terms "principal office," "principal office in this state" and "registered office," wherever used in this act, shall be construed as synonymous terms. (P. L. 1900, p. 313, c. 124, §§ 2, 3.)

44. Place of holding meetings of stockholders; directors may hold meetings outside of state; principal office and agent in this state; court may order books brought within this state. In all cases where it is not otherwise provided by law, the meetings of the stockholders of every corporation of this state shall be held at its principal office in this state; the directors may hold their meetings, and have an office, and keep the

books of the corporation (except the stock and transfer books) outside of this state, if the by-laws or certificate of incorporation so provide; every corporation shall maintain a principal office in this state, and have an agent in charge thereof, wherein shall be kept the stock and transfer books for the inspection of all who are authorized to see the same, and for the transfer of stock; the court of chancery or the supreme court, or any justice thereof, may, upon proper cause shown, summarily order any or all of the books of said corporation to be forthwith brought within this state, and kept therein at such place and for such time as may be designated in such order, and the charter of any corporation failing to comply with such order may be declared forfeited by the court making such order, and it shall thereupon cease to be a corporation, and all its directors and officers shall be liable to be punished for contempt of court for disobedience of such order.

45. Name of corporation to be displayed at entrance of office; penalty for failure. The name of every corporation shall be at all times conspicuously displayed at the entrance of its principal office in this state, and in default thereof the directors shall be jointly and severally liable to a penalty of two hundred dollars, to be recovered with costs, by the state, before any court of competent jurisdiction, by action to be prosecuted by the attorney-general; and they shall jointly and severally be liable to a like penalty for every thirty days' additional default from and after the service of process in the first action, to be recovered in like manner.

46. Calling of meeting by three or more stockholders; conduct of such meeting. Whenever, for any reason, a legal meeting of the stockholders of any corporation cannot be otherwise called, three or more stockholders having voting powers may call such meeting by publishing ten days' notice of the time, place and purposes of the meeting in a newspaper published in the county in which its principal office in this state is located, and mailing such notice to all stockholders whose post-office address is known or can be ascertained; a meeting called as aforesaid shall be a legal meeting of the corporation, and if there be no officers present, the stockholders may elect officers for the meeting; and the secretary of the meeting shall record the proceedings thereof in the book of minutes of the corporation.

IV. DIVIDENDS—PAYMENT OF CAPITAL STOCK.

47. Duty of directors to declare dividends. Unless otherwise provided in the original or amended certificate of incorporation, or in a by-law adopted by a vote of at least a majority of the stockholders, the directors of every corporation created under this act shall, in January in each year, after reserving over and above its capital stock paid in, as a working capital for said corporation, such sum, if any, as shall have been fixed by the stockholders, declare a dividend among its stockholders of the whole of its accumulated profits exceeding the amount so reserved, and pay the same to such stockholders on demand. (As amended by P. L. 1901, p. 245, c. 110.)

48. Payment of capital stock; loans to stockholders prohibited; liability of officers. Nothing but money shall be considered as payment of any part of the capital stock of any corporation organized under this act, except as hereinafter provided in case of the purchase of property, and no loan of money shall be made to a stockholder or officer thereof; and if any such loan be made the officers who make it, or assent thereto, shall be jointly and severally liable, to the extent of such loan and interest, for all the debts of the corporation until the repayment of the sum so loaned.

49. Corporation may purchase property and issue stock in payment; statutory duties and functions of directors in respect to such issue. Any corporation formed under this act may purchase mines, manufactories or other property necessary for its business, or the stock of any company or companies owning, mining, manufacturing or producing materials, or other property necessary for its business, and issue stock to the amount of the value thereof in payment therefor, and the stock so issued shall be full-paid stock and not liable to any further call, neither shall the holder thereof be liable for any further payment under any of the provisions of this act; and in the absence of actual fraud in the transaction, the judgment of the directors as to the value of the property purchased shall be conclusive; and in all statements and reports of the corporation to be published or filed this stock shall not be stated or reported as being issued for cash paid to the corporation, but shall be reported in this respect according to the fact.

50. Certain corporations may subscribe, hold and dispose of stock and bonds of other companies. Corporations having for their object the building, constructing or repairing of railroads, water, gas or electric works, tunnels, bridges, viaducts, canals, hotels, wharves, piers or any like works of internal improvement or public use or utility, may subscribe for, take, pay for, hold, use and dispose of stock or bonds in any corporations formed for the purpose of constructing, maintaining and operating any such public works; and the directors of any such corporation formed for the purpose of constructing, maintaining and operating any public work of the description aforesaid may accept in payment of any such subscription, or purchase, real or personal property, necessary for the purposes of such corporation, or work, labor and services performed or materials furnished to or for such corporation to the amount of the value thereof, and from time to time issue upon any such subscription or purchase, in such installments or proportions as such directors may agree upon, full-paid stock in full or partial performance of the whole or any part of such subscription or purchase, and the stock so issued shall be full-paid stock and not liable to any further call, neither shall the holder thereof be liable for any further payments, and in all statements and reports of the corporation to be published or filed this stock shall not be stated or reported as being issued for cash paid to the corporation, but shall be reported in this respect according to the fact.

51. Corporations authorized to hold, sell and dispose of stock and bonds of other corporations. Any corporation may purchase, hold, sell, assign, transfer, mortgage, pledge or otherwise dispose of the shares of the capital stock of, or any bonds, securities or evidences of indebtedness created by any other corporation or corporations of this or any other state, and while owner of such stock may exercise all the rights, powers and privileges of ownership, including the right to vote thereon.

52. Liability of corporate officers for signing false notices or certificates. If any certificate made, or any public notice given by the officers of any corporation, in pursuance of the provisions of this act, shall be false in any material representation, all the officers who shall have signed the same, knowing it to be false, shall be jointly and severally liable for all the debts of the corporation contracted while they were stockholders or officers thereof, as a penalty enforceable in the courts of this state only.

V. WINDING UP.

53. Continuance of corporate existence for purpose of settling up business. All corporations, whether they expire by their own limitation or be annulled by the legislature or otherwise dissolved, shall be continued bodies corporate for the purpose of prosecuting and defending suits by

or against them, and of enabling them to settle and close their affairs to dispose of and convey their property and to divide their capital, but not for the purpose of continuing the business for which they were established.

54. Directors to be trustees upon dissolution; powers and duties. Upon the dissolution in any manner of any corporation the directors shall be trustees thereof, with full power to settle the affairs, collect the outstanding debts, sell and convey the property and divide the moneys and other property among the stockholders, after paying its debts, as far as such moneys and property shall enable them. They shall have power to meet and act under the by-laws of the corporation and, under regulations to be made by a majority of said trustees, to prescribe the terms and conditions of the sale of such property, and may sell all or any part for cash, or partly on credit, or take mortgages and bonds for part of the purchase price for all or any part of said property. In case of a vacancy or vacancies in the board of directors of such corporation existing at the time of dissolution or occurring subsequent thereto, the surviving directors or director shall be the trustees or trustee thereof, as the case may be, with full power to settle the affairs, collect the outstanding debts, sell and convey the property and divide the moneys and other property among the stockholders, after paying its debts, as far as such moneys and property shall enable them, and to do and perform all such other acts as shall be necessary to carry out the provisions of this act relative to the winding up of the affairs of such corporation and to the distribution of its assets. (As amended by P. L. 1910, p. 51, c. 36.)

55. Additional powers and liabilities of such trustees. The directors, constituted trustees as aforesaid, shall have authority to sue for and recover the aforesaid debts and property, by the name of the corporation, and shall be suable by the same name, or in their own names or individual capacities, for the debts owing by such corporation, and shall be jointly and severally responsible for such debts, to the amount of the moneys and property of the corporation which shall come to their hands or possession as such trustees.

56. Court of chancery may appoint receiver of dissolved corporation; powers and duties of such receiver. When any corporation shall be dissolved in any manner whatever, the court of chancery, on application of any creditor or stockholder at any time, may either continue the directors trustees as aforesaid, or appoint one or more persons to be receivers of such corporation, to take charge of the estate and effects thereof, and to collect the debts and property due and belonging to the corporation, with power to prosecute and defend, in the name of the corporation or otherwise, all suits necessary or proper for the purposes aforesaid, and to appoint an agent or agents under them, and to do all other acts which might be done by such corporation, if in being, that may be necessary for the final settlement of its unfinished business; and the powers of such trustees or receivers may be continued as long as the court shall think necessary for such purposes.

57. Jurisdiction and powers of court of chancery. The court of chancery shall have jurisdiction of said application and of all questions arising in the proceedings thereon, and may make such orders and decrees therein as justice and equity shall require.

58. Duties of trustees or receivers as to distribution of funds. The said trustees or receivers shall pay ratably, as far as its moneys and property shall enable them, all the creditors of the corporation who prove their debts in the manner directed by the court; and if any balance remain after the payment of such debts and necessary expenses, the same shall be distributed among the stockholders.

59. Actions not to abate on dissolution. Any action, now pending or

to be hereafter begun, against any corporation which may become dissolved before final judgment, shall not abate by reason thereof, but no judgment shall be entered therein except upon notice to the trustees or receivers of the corporation.

60. Copy of decree of dissolution to be filed in office of secretary of state. A copy of every decree or judgment dissolving a corporation or forfeiting its charter shall be forthwith filed by the clerk of the court in the office of the secretary of state, and a note thereof shall be made by the secretary of state on the charter or certificate of incorporation, and in the index thereof, and be published by him in the annual volume of laws.

VI. EXECUTION AGAINST CORPORATION.

61. Execution, schedule of property, etc. Every agent or person having charge or control of any property of a corporation, on request of any public officer, having for service a writ of execution against it, shall furnish to him the names of the directors and officers thereof, and a schedule of all its property, including debts due or to become due to it, so far as he may have knowledge of the same.

62. Execution may be satisfied by debts due the corporation. If any officer, holding an execution, shall be unable to find other property belonging to the corporation liable to execution, he or the judgment creditor may elect to satisfy such execution, in whole or in part, by any debts due to the corporation; and it shall be the duty of any agent or person having custody of any evidence of such debt, to deliver the same to the officer, for the use of the creditor, and such delivery, with a transfer to the officer in writing, for the use of the creditor, and notice to the debtor, shall be a valid assignment thereof; and such creditor may sue for and collect the same in the name of the corporation, subject to such equitable set-offs on the part of the debtor as in other assignments; and every agent or person who shall neglect or refuse to comply with the provisions of this and the last preceding section, shall be himself liable to pay to the execution creditor the amount due on said execution, with costs.

VII. INSOLVENCY.

63. Duties of directors in case of insolvency. Whenever any corporation shall become insolvent, the directors, within ten days thereafter, shall call a meeting of the stockholders, and lay before them for inspection and examination all the books of accounts, by-laws and minutes of the corporation, and exhibit a full and true statement of all its estate, funds and property, and of all the debts due and owing to it, and by whom, and of all the debts owing by it, and to whom, as far as the directors can at that time make out the same; so as to exhibit to the stockholders a full, fair and true account of the situation of the affairs of the corporation.

64. Unlawful to convey, sell, etc., property in case of insolvency. Whenever any corporation shall become insolvent or shall suspend its ordinary business for want of funds to carry on the same, neither the directors nor any officer or agent of the corporation shall sell, convey, assign or transfer any of its estate, effects, choses in action, goods, chattels, rights or credits, lands or tenements; nor shall they or either of them make any such sale, conveyance, assignment or transfer in contemplation of insolvency, and every such sale, conveyance, assignment or transfer shall be utterly null and void as against creditors; provided, that a bona fide purchase for a valuable consideration, before the corporation shall have

actually suspended its ordinary business, by any person without notice of such insolvency or of the sale being made in contemplation of insolvency, shall not be invalidated or impeached.

65. Remedy in chancery by bill. Whenever any corporation shall become insolvent or shall suspend its ordinary business for want of funds to carry on the same, any creditor or stockholder may by petition or bill of complaint setting forth the facts and circumstances of the case, apply to the court of chancery for a writ of injunction and the appointment of a receiver or receivers or trustees, and the court being satisfied by affidavit or otherwise of the sufficiency of said application, and of the truth of the allegations contained in the petition or bill, and upon such notice, if any, as the court by order may direct, may proceed in a summary way to hear the affidavits, proofs and allegations which may be offered on behalf of the parties, and if upon such inquiry it shall appear to the court that the corporation has become insolvent and is not about to resume its business in a short time thereafter with safety to the public and advantage to the stockholders, it may issue an injunction to restrain the corporation and its officers, and agents from exercising any of its privileges or franchises and from collecting or receiving any debts, or paying out, selling, assigning or transferring any of its estate, moneys, funds, lands, tenements or effects, except to a receiver appointed by the court, until the court shall otherwise order.

66. Court may appoint receivers. The court of chancery, at the time of ordering said injunction, or at any time afterwards, may appoint a receiver or receivers or trustees for the creditors and stockholders of the corporation, with full power and authority to demand, sue for, collect, receive and take into their possession all the goods and chattels, rights and credits, moneys and effects, lands and tenements, books, papers, choses in action, bills, notes and property of every description of the corporation, and to institute suits at law or in equity for the recovery of any estate, property, damages or demands existing in favor of the corporation, and in his or their discretion to compound and settle with any debtor or creditor of the corporation, or with persons having possession of its property or in any way responsible at law or in equity to the corporation at the time of its insolvency or suspension of business, or afterwards, upon such terms and in such manner as he or they shall deem just and beneficial to the corporation, and in case of mutual dealings between the corporation and any person to allow just sets offs in favor of such person in all cases in which the same ought to be allowed according to law and equity; a debtor who shall have in good faith paid his debt to the corporation without notice of its insolvency or suspension of business, shall not be liable therefor, and the receiver or receivers or trustees shall have power to sell, convey and assign all the said estate, rights and interests, and shall hold and dispose of the proceeds thereof under the directions of the court of chancery; the word receiver as used in this act shall be construed to include receivers and trustees appointed as provided in this act.

67. Oath of receiver. Every receiver shall before acting enter into such bond and comply with such terms as the court may prescribe, and take and subscribe the following oath or affirmation: "I, ———, do swear (or affirm) that I will faithfully, honestly and impartially execute the powers and trusts reposed in me as receiver, for the creditors and stockholders of the ———, and that without favor or affection," which oath or affirmation shall be filed in the office of the clerk in chancery within ten days after the taking thereof.

68. Property vested in receiver. All the real and personal property of an insolvent corporation, wheresoever situated, and all its franchises,

rights, privileges and effects shall, upon the appointment of a receiver, forthwith vest in him, and the corporation shall be divested of the title thereto.

69. When debts have been paid, court may order receiver to reconvey property; court may dissolve corporation. Whenever a receiver shall have been appointed as aforesaid and it shall afterwards appear that the debts of the corporation have been paid or provided for, and that there remains or can be obtained by further contributions sufficient capital to enable it to resume its business, the court of chancery may, in its discretion, a proper case being shown, direct the receiver to reconvey to the corporation all its property, franchises, rights and effects, and thereafter the corporation may resume control of and enjoy the same as fully as if the receiver had never been appointed; and in every case in which the court of chancery shall not direct such reconveyance, said court may, in its discretion, make a decree dissolving the corporation and declaring its charter forfeited and void.

70. Upon re-organization, may issue bonds or stock, etc., to creditors. Whenever a majority in interest of the stockholders of such corporation shall have agreed upon a plan for the re-organization of the corporation and a resumption by it of the management and control of its property and business, such corporation may, with the consent of the court of chancery, upon the reconveyance to it of its property and franchises, mortgage the same for such amount as may be necessary for the purposes of such re-organization; and may issue bonds or other evidences of indebtedness, or additional stock, or both, and use the same for the full or partial payment of the creditors who will accept the same, or otherwise dispose of the same for the purposes of the re-organization.

71. Power of receivers to examine witnesses, etc. Such receiver shall have power to send for persons and papers and to examine any persons, including the creditors and claimants, and the president, directors and other officers and agents of the corporation, on oath or affirmation (which oath or affirmation the receiver may administer), respecting its affairs and transactions and its estate, money, goods, chattels, credits, notes, bills, and choses in action, real and personal estate and effects of every kind, and also respecting its debts, obligations, contracts and liabilities, and the claims against it; and if any person shall refuse to be sworn or affirmed, or to make answers to such questions as shall be put to him, or refuse to declare the whole truth touching the subject-matter of the said examination, the court of chancery may, on report by the receiver, commit such person to prison, there to remain until he shall submit himself to be examined, and pay all the costs of the proceedings against him.

72. Power to search, etc. Such receiver, with the assistance of a peace officer, may break open, in the daytime, the houses, shops, warehouses, doors, trunks, chests, or other places of the corporation where any of its goods, chattels, choses in action, notes, bills, moneys, books, papers or other writings or effects, have been usually kept, or shall be, and take possession of the same, and of the lands and tenements belonging to the corporation.

73. Acts of majority of receivers valid; may be removed and others appointed. Every matter and thing by this act required to be done by receivers or trustees shall be good and effectual, to all intents and purposes, if performed by a majority of them; and the court of chancery may remove any receiver or trustee, and appoint another or others in his place or fill any vacancy which may occur.

74. Inventory and report. Such receiver, as soon as convenient, shall lay before the court of chancery a full and complete inventory of all the estate, property and effects of the corporation, its nature and probable value, and an account of all debts due from and to it, as nearly as the

same can be ascertained, and make a report to the court of his proceedings every six months thereafter during the continuance of the trust.

75. Court may limit time for creditors to make proof of claims. The court of chancery may limit the time within which creditors shall present and make proof to such receiver of their respective claims against the corporation, and may bar all creditors and claimants failing so to do within the time limited from participating in the distribution of the assets of the corporation; the court may also prescribe what notice, by publication or otherwise, shall be given to creditors of such limitation of time.

76. Claims to be under oath. Every claim against an insolvent corporation shall be presented to the receiver in writing and upon oath; and the claimant, if required, shall submit himself to such examination in relation to the claims as the receiver shall direct, and shall produce such books and prepare papers relating to the claim as shall be required; and the receiver shall have power to examine, under oath or affirmation, all witnesses produced before him touching the claims, and shall pass upon and allow or disallow the claims, or any part thereof, and notify the claimants of his determination.

77. Trial by jury allowed at the circuit. Any creditor or claimant who shall lay his claim before such receiver may, at the same time, demand that a jury shall decide thereon, and in like manner the receiver may demand that the same shall be referred to a jury; and in either case such demand shall be entered on the minutes of the receiver, and thereupon an issue shall be made up between the parties, under the direction of one of the justices of the supreme court, and a jury impaneled, as in other cases, to try the same in the circuit court of the county in which the corporation carried on its business or had its principal office; the verdict of the jury shall be subject to the control of the supreme court, as in suits originally instituted therein, and when rendered, if not set aside by the court, shall be certified by the clerk of the supreme court to the receiver; the creditor shall be considered, in all respects, as having proved his debt or claim for the amount so ascertained to be due, and in all cases in which no trial by jury shall be demanded the court of chancery shall have jurisdiction to pass upon the claims presented and to determine the rights of the claimants, and to make such order or decree touching the same as shall be equitable and just.

78. Persons aggrieved by proceedings may appeal. Every such insolvent corporation, or any person aggrieved by the proceedings or determination of such receiver in the discharge of his duty, may appeal to the court of chancery, which court shall, in a summary way, hear and determine the matter complained of, and make such order touching the same as shall be equitable and just.

79. Upon application, receiver to be substituted as party to suits. Such receiver shall, upon application by him, be substituted as party plaintiff or complainant in the place and stead of the corporation in any suit or proceeding at law or in equity which was pending at the time of his appointment.

80. Suits not to abate by death of receiver. No action against a receiver of a corporation shall abate by reason of his death, but, upon suggestion of the facts on the record, shall be continued against his successor, or against the corporation in case no new receiver be appointed.

81. Court may order receiver to sell lands, etc. Where property of an insolvent corporation is at the time of the appointment of a receiver encumbered with mortgages or other liens, the legality of which is brought in question, and the property is of a character materially to deteriorate in value pending the litigation, the court of chancery may order the receiver to sell the same, clear of encumbrances, at public or private sale,

for the best price that can be obtained, and pay the money into the court, there to remain subject to the same liens and equities of all parties in interest as was the property before sale, to be disposed of as the court shall direct.

82. Receiver may sell or lease principal work, chartered rights, etc. Whenever a receiver of a corporation shall have charge of a canal, railroad, turnpike or other work of a public nature, in which the value of the work is dependent upon the franchise, and in the continuance of which the public as well as the stockholders and creditors have an interest, the receiver may sell or lease the principal work for the construction whereof the said corporation was organized, together with all the chartered rights, privileges and franchises belonging to it and appertaining to such principal work; and the purchaser or purchasers, lessee or lessees of such principal work, chartered rights, privileges and franchises, shall thereafter hold, use and enjoy the same during the whole of the residue of the term limited in the charter of said corporation, or during the term in such lease specified, in as full and ample a manner as such corporations could or might have used and enjoyed the same; subject, however, to all the restrictions, limitations and conditions contained in such charter; provided, that nothing in this section contained shall be so construed as to apply to or in anywise affect any corporation authorized by law to exercise banking privileges.

83. Laborers and workmen to have first lien on assets. In case of the insolvency of any corporation the laborers and workmen, and all persons doing labor or service of whatever character, in the regular employ of such corporation, shall have a first and prior lien upon the assets thereof for the amount of wages due to them respectively for all labor, work and services done, performed or rendered within two months next preceding the date when proceedings in insolvency shall be actually instituted and begun against such insolvent corporation.

84. Chattel mortgages to be first liens. Such liens shall be prior to all other liens that can or may be acquired upon or against such assets, except the lien and encumbrance of a chattel mortgage, recorded more than two months next preceding the date when proceedings in insolvency shall have been actually instituted against such insolvent corporation, and except the lien and encumbrance of a chattel mortgage recorded within two months next preceding the date when proceedings in insolvency shall have been actually instituted against such insolvent corporation, for money loaned or for goods purchased within said period of two months; and also except as against the lien of mortgages given upon the lands and real estate of such insolvent corporations.

85. Compensation of receivers. Before distribution of the assets of an insolvent corporation among the creditors or stockholders the court of chancery shall allow a reasonable compensation to the receiver for his services and the costs and expenses of the administration of his trust, and the costs of the proceedings in said court, to be first paid out of said assets.

86. How distribution made. After payment of all allowances, expenses and costs, and the satisfaction of all special and general liens upon the funds of the corporation to the extent of their lawful priority, the creditors shall be paid proportionally to the amount of their respective debts, excepting mortgage and judgment creditors when the judgment has not been by confession for the purpose of preferring creditors; and the creditors shall be entitled to distribution on debts not due, making in such case a rebate of interest, when interest is not accruing on the same; and the surplus funds, if any, after payment of the creditors and the costs, expenses and allowances aforesaid, and the preferred stockholders, shall be divided and paid to the general stockholders proportionally, according to their respective shares.

VIII. SERVICE OF PROCESS.

87. Process against corporations of this state. In any personal action commenced against a corporation in any of the courts of law of this state, the first process to be made use of may be a summons, a copy whereof shall be served on the president, or other head officer or agent in charge of its principal office in this state, or left at his dwelling-house or usual place of abode, at least six days before its return; and in case the president or other head officer or agent cannot be found to be served with process, and has no dwelling-house, or usual place of abode within this state, a copy of the summons shall be served on the clerk or secretary of the corporation, if any there be, and if no clerk or secretary, then on one of its directors, or left at his dwelling-house, or usual place of abode, six days before its return.

88. Process against foreign corporations. In all personal suits or actions hereafter brought in any court of this state, against any foreign corporation, process may be served upon any officer, director, agent, clerk or engineer of such corporation, either personally by leaving a copy thereof at his dwelling-house or usual place of abode, or by leaving a copy at the office, depot, or usual place of business of such foreign corporation; provided, that in case there is no officer, director, agent, clerk or engineer of said corporation residing in this state, nor any office, depot or usual place of business in this state, process may be served upon any motorman, conductor or servant of said corporation while in the discharge of his duties. (As amended by L. 1908, p. 176, c. 113.)

89. When defendant in court. When the sheriff or other officer shall return such summons "served" or "summoned," the defendant shall be considered as appearing in court, and may be proceeded against accordingly.

90. Proceedings when summons returned "not served" or "not summoned." In case the sheriff or other officer shall return a summons, issued against any corporation of this state, "not served" or "not summoned," and an affidavit shall be made to the satisfaction of the court that process cannot be served upon it, the court shall make an order directing the defendant to cause its appearance to be entered to the action, on a day to be specified in the order, a copy of which order shall be inserted in one of the newspapers published in this state, for at least three weeks, once in each week, and a copy thereof shall also be posted in three public places in this state, as shall be ordered by the court, for at least three weeks, and if the defendant shall not appear within the time limited by the order, or within such further time as the court shall limit, then, on proof of the publication and posting of the order, the court shall order the clerk to enter appearance for the defendant, and thereupon the action shall proceed as if the defendant had entered its appearance to the action.

91. Corporation not to alien lands during suit if order for publication is made. No corporation against which an order for publication shall be made, as aforesaid, shall grant, bargain, sell, alien or convey any lands, tenements or real estate in this state (in case the said summons issued out of the supreme court), or in the county in which the said summons shall have been issued (in case the said summons issued out of the circuit court or the court of common pleas), of which it shall be seized or entitled to at the time of making such order, until the plaintiff in the action shall be satisfied his legal demand, or until judgment shall be entered for the defendants; and the said action shall be and remain a lien on such lands, tenements and real estate, from the time of entering the said order for publication in the minutes of the court, and the said lands, tenements and real estate shall and may be sold on execution, as if no conveyance had been made by the said corporation.

IX. REMEDIES AGAINST OFFICERS AND STOCKHOLDERS.

92. Action for liability imposed by act. When the officers, directors or stockholders of any corporation shall be liable to pay the debts of the corporation, or any part thereof, any person to whom they are liable may have an action against any one or more of them; and the declaration shall state the claim against the corporation, and the ground on which the plaintiff expects to charge the defendants personally; or the person to whom they are liable may have his remedy by bill in chancery.

93. Stockholders, etc., who pay company's debts may recover. Any officer, director or stockholder who shall pay any debt of a corporation for which he is made liable by the provisions of this act, may recover the amount so paid in an action against the corporation for money paid for its use, in which action only the property of the corporation shall be liable to be taken, and not the property of any stockholder.

94. No sale or satisfaction to be had of property until judgment is obtained. No sale or other satisfaction shall be had of the property of any director or stockholder for any debt of the corporation of which he is such director or stockholder till judgment be obtained therefor against such corporation and execution thereon returned unsatisfied, but any suit brought against any director or stockholder for such debts shall stay after execution levied, or other proceedings to acquire a lien, until such return shall have been made.

X. FOREIGN CORPORATIONS.

95. Foreign corporations may hold and convey lands, etc. Any corporation created by any other state or by any foreign state, kingdom or government may acquire by devise or otherwise and hold, mortgage, lease and convey real estate in this state for the purpose of prosecuting its business or objects, or such real estate as it may acquire by way of mortgage or otherwise, in the payment of debts due such corporation; provided, such foreign state, kingdom or government, under whose laws such corporation was created, shall not be at the time of such purchase at war with the United States. [See also p. 683, below.]

96. Foreign corporations subject to this act. Foreign corporations doing business in this state shall be subject to the provisions of this act, so far as the same can be applied to foreign corporations.

97. Foreign corporations to file copy of charter, statement, etc., before commencing business. Every foreign corporation, except banking, insurance, ferry and railroad corporations, before transacting any business in this state, shall file in the office of the secretary of state a copy of its charter or certificate of incorporation, attested by its president and secretary, under its corporate seal, and a statement attested in like manner of the amount of its capital stock authorized and the amount actually issued, the character of the business which it is to transact in this state, and designating its principal office in this state and an agent who shall be a domestic corporation or a natural person of full age actually resident in this state, together with his place of abode, upon which agent process against such corporation may be served, and the agency so constituted shall continue until the substitution, by writing, of another agent; upon the filing of such copy and statement the secretary of state shall issue to such corporation a certificate that it is authorized to transact business in this state, and that the business is such as may be lawfully transacted by corporations of this state, and he shall keep a record of all such certificates issued.

98. Cannot maintain actions until certificate of secretary of state is obtained. Until such corporation so transacting business in this state shall have obtained said certificate of the secretary of state, it shall not

maintain any action in this state, upon any contract made by it in this state; provided, that nothing herein shall prevent the enforcement of any contract made prior to the fourteenth day of March, one thousand eight hundred and ninety-five.

99. Failure to appoint agent in case of death revokes authority to transact business. If said agent shall die, remove from the state or become disqualified, such corporation shall forthwith file in the office of the secretary of state a written appointment of another agent, attested in the manner above provided, and in case of the omission to do so within thirty days after such death, removal or disqualification, then the secretary of state, upon being satisfied that such omission has continued for thirty days, shall, by entry on the record thereof, revoke the certificate of authority to transact business within this state, and process against such corporation in actions upon any liability incurred within this state before the designation of another agent may, after such revocation, be served upon the secretary of state; at the time of such service the plaintiff shall pay to the secretary of state for the use of the state two dollars, to be included in the taxable costs of such plaintiff, and the secretary of state shall forthwith mail a copy of such process to such corporation at its general office or to the address of some officer thereof, if known to him.

100. Unlawful to transact business until conditions are complied with. Every foreign corporation transacting any business in any manner whatsoever, directly or indirectly, in this state, without having first obtained authority therefor, as hereinabove provided, shall for each offense forfeit to the state the sum of two hundred dollars, to be recovered with costs in an action prosecuted by the attorney-general in the name of the state.

101. Foreign corporations to pay same fees, etc., imposed upon corporations of this state by laws of other states. When, by the laws of any other state or nation, any other or greater taxes, fines, penalties, licenses, fees or other obligations or requirements are imposed upon corporations of this state, doing business in such other state or nation, or upon their agents therein, than the laws of this state imposed upon their corporations or agents doing business in this state, so long as such laws continue in force in such foreign state or nation, the same taxes, fines, penalties, licenses, fees, obligations and requirements of whatever kind shall be imposed upon all corporations of such other state or nation doing business within this state and upon their agents here; provided, that nothing herein shall be held to repeal any duty, condition or requirement now imposed by law upon such corporations of other states or nations transacting business in the state.

102. Writs against foreign corporations; how served. In any proceeding in any court of this state against a foreign corporation requiring the use of any prerogative writ such writ may be served upon the president, vice-president, secretary or other head officer, or any director, either personally or by leaving a copy at the dwelling-house or usual place of abode of such officer or director, or upon any general agent, attorney, solicitor, superintendent or manager of such corporation.

103. How writs may be enforced upon failure to make return, etc. In case any such corporation, after the service of any such writ, as aforesaid, shall neglect or refuse to make a proper return thereto, or shall neglect or refuse to obey the command of any such writ, when issued upon any judgment, order or decree of the supreme court, court of chancery, or any of the circuit courts of this state, and served as aforesaid, within the time prescribed by such writ, said court may enforce such writs by attachment or sequestration upon the property, rights and credits of the corporation within this state.

XI. MERGER OF CORPORATIONS.

104. Corporations of this state may merge and consolidate. Any two or more corporations organized or to be organized under any law or laws of this state for the purpose of carrying on any kind of business of the same or a similar nature may merge or consolidate into a single corporation, which may be either one of said merging or consolidating corporations, or a new corporation to be formed by means of such merger and consolidation; but the provisions of this act relative to merger and consolidation shall not apply to any railroad company, insurance company (except companies for the insurance or guaranty of the title to lands), banking company, savings bank or other corporation intended to derive profit from the loan and use of money, turnpike company or canal company.

105. Mode and proceedings for merger and consolidation. The consolidation or merger shall be made under the conditions, provisions, restrictions, and with the powers hereinafter mentioned:

I. The directors of the several corporations proposing to merge or consolidate may enter into a joint agreement under the corporate seals of the respective corporations, for the merger or consolidation of said corporations, and prescribing the terms and conditions thereof, the mode of carrying the same into effect, the name of the new corporation (if one shall be so formed or created), or of the consolidated corporation, as the case may be; the number, names and places of residence of the first directors and officers of such new or consolidated corporation (who shall hold their offices until their successors be chosen or appointed, either according to law or according to the by-laws of the said corporation); the number of shares of the capital stock, whether common or preferred, and the amount or par value of each share of such new or consolidated corporation; and the manner of converting the capital stock of each of said merging or consolidating corporations into the stock or obligations of such new or consolidated corporation, and in case of the creation of a new corporation, how and when the directors and officers shall be chosen or appointed; together with all such other provisions and details as such first-mentioned directors shall deem necessary to perfect the merger consolidation of said corporation.

II. The agreement shall be submitted to the stockholders of each of said merging or consolidating corporations, separately, at a meeting thereof, to be called for the purpose of taking the same into consideration; and twenty days' notice of the time, place and object of such meeting shall be mailed to the last known post-office address of each of such stockholders; and at the said meetings of stockholders the said agreement of such directors shall be considered, and a vote of the stockholders of each corporation by ballot shall be taken separately, for the adoption or rejection of the same, each share of stock entitling the holder thereof to one vote, and said ballots shall be cast in person or by proxy; and if the votes of the holders of two-thirds of all the capital stock of each of the said merging or consolidating corporations shall be for the adoption of said agreement, that fact shall be certified thereon by the secretary of each of the respective corporations, under the seal thereof, and the agreement, so adopted and so certified, shall be filed in the office of the secretary of state, and shall from thence be deemed and taken to be the agreement and act of merger or consolidation of the said corporations, and a copy of said agreement and act of merger or consolidation, duly certified by the secretary of state under the seal thereof, shall be evidence of the existence of such new or consolidated corporation.

106. Corporations merging or consolidating shall be one corporation. Upon making and perfecting the said agreement and act of merger or

consolidation, and filing the same in the office of the secretary of state, the several corporations shall be one corporation, by the name provided in said agreement (in case a new corporation shall be created thereby), or by the name of the consolidated corporation into which said other contracting corporation or corporations shall be so merged or consolidated, as the case may be, and possessing all the rights, privileges, powers and franchises, as well of a public as of private nature, and being subject to all the restrictions, disabilities and duties of each of such corporations so merged or consolidated, except as altered by the provisions of this act.

107. Rights to be vested in new corporation. Upon the consummation of said act of merger or consolidation, all and singular, the rights, privileges, powers and franchises of each of said corporations, and all property, real, personal and mixed, and all debts due on whatever account, as well for stock subscriptions as all other things in action or belonging to each of such corporations, shall be vested in the consolidated corporation; and all property, rights, privileges, powers and franchises, and all and every other interest shall be thereafter as effectually the property of the consolidated corporation as they were of the several and respective former corporations, and the title to any real estate, whether by deed or otherwise, under the laws of this state, vested in either of such corporations, shall not revert or be in any way impaired by reason of this act; provided, that all rights of creditors and all liens upon the property of either of said former corporations shall be preserved unimpaired, and the respective former corporations may be deemed to continue in existence, in order to preserve the same; and all debts, liabilities and duties of either of said former corporations shall thenceforth attach to said consolidated corporation, and may be enforced against it to the same extent as if said debts, liabilities and duties had been incurred or contracted by it.

108. Dissenting stockholders may petition court for appointment of appraisers. If any of the corporations so authorized to merge or consolidate shall have the right to exercise any franchise, for public use, and any stockholder thereof not voting in favor of such agreement shall dissent therefrom and shall refuse or neglect to convert his stock into the stock of such consolidated corporation, or to dispose thereof in the manner and on the terms specified in such agreement, such dissenting stockholder or such consolidated corporation may, at any time within thirty days after the adoption and filing of the agreement of consolidation, apply by petition to the circuit court of the county in which the chief office of the corporation whose stockholders shall so dissent or neglect, was or is located, on reasonable notice to be prescribed by said court to said consolidated corporation, or to such dissenting stockholder, as the case may be, for the appointment of three disinterested appraisers to appraise the full market value of his stock, without regard to any depreciation or appreciation thereof in consequence of the said merger or consolidation, and whose award (or that of a majority of them) when confirmed by the said court, shall be final and conclusive on all parties, and said consolidated corporation shall pay to such stockholder the value of his stock as aforesaid; and on receiving such payment, or on a tender thereof, or in case of any legal disability or absence from the state, on the payment of such award into said court, said stockholder shall transfer his stock to the said consolidated corporation to be disposed of by the directors thereof, or to be retained for the benefit of the remaining stockholders; and in case the said award is not so paid within thirty days from the filing of said award and confirmation by said court, and notice thereof to be given in the manner aforesaid unto said stockholder or said consolidated corporation, the amount of the award shall be a judg-

ment against said corporation, and may be collected as other judgments in said court are by law collectible. [See also p. 491, below.]

109. Consolidated corporation authorized to issue bonds and mortgage property. When two or more corporations are merged or consolidated the consolidated corporation shall have power and authority to issue bonds or other obligations, negotiable or otherwise, and with or without coupons or interest certificates thereto attached, to an amount sufficient with its capital stock to provide for all the payments it will be required to make or obligations it will be required to assume, in order to effect such merger or consolidation; to secure the payment of which bonds or obligations it shall be lawful to mortgage its corporate franchises, rights, privileges and property, real, personal and mixed; provided, such bonds shall not bear a greater rate of interest than six per centum per annum; the consolidated corporation may purchase, acquire, hold and dispose of the stocks of other corporations of this state or elsewhere, and exercise in respect thereto all the powers of stockholders thereof, and may issue capital stock, either common or preferred, or both, to such an amount as may be necessary, to the stockholders of such merging or consolidating corporations in exchange or payment for their original shares, in the manner and on the terms specified in the agreement of merger or consolidation; which may fix the amount and provide for the issue of preferred stock based on the property or stock of the merging or consolidating corporations conveyed to the consolidated corporation, as well as upon money capital paid in.

XII. TAXATION.

110. Real and personal property; how taxed. All real and personal property of every corporation shall be taxed the same as the real and personal property of an individual; provided, that this action shall not apply to railway, turnpike, insurance, canal or banking corporations. or to savings banks, or to cemeteries, church property, or purely charitable or educational associations. [See also p. 708, below.]

XIII. LOST CERTIFICATES OF STOCK.

111. New certificates issued for certificates lost or destroyed. Every corporation may issue a new certificate of stock in the place of any certificate theretofore issued by it, alleged to have been lost or destroyed, and the directors authorizing such issue of a new certificate may, in their discretion, require the owner of the lost or destroyed certificate, or his legal representatives, to give the corporation a bond, in such sum as they may direct, as indemnity against any claim that may be made against such corporation; a new certificate may be issued without requiring any bond when, in the judgment of the directors, it is proper so to do.

112. Proceedings on refusal to issue new certificate. Whenever any corporation shall have refused to issue a new certificate of stock in place of one theretofore issued by it, or by any corporation of which it is the lawful successor, alleged to have been lost or destroyed, the owner of the lost or destroyed certificate, or his legal representatives, may apply to the circuit court of the county in which the principal office of the corporation is located for an order requiring the corporation to show cause why it should not be required to issue a new certificate of stock in place of the one so lost or destroyed; such application shall be by petition, duly verified, in which shall be stated the name of the corporation, the number and date of the certificate, if known or ascertainable by the petitioner, the number of shares of stock named therein and to whom issued, and a statement of the circumstances attending such loss or destruction; thereupon said court shall make an order requiring

the corporation to show cause, at a time and place therein mentioned, why it should not be required to issue a new certificate of stock in place of the one described in the petition; a copy of the petition and order shall be served upon the president or other head officer of the corporation, or on the cashier, secretary or treasurer thereof, personally, at least ten days before the time designated in the order.

113. Court may proceed in summary manner. At the time and place specified in the order, and on proof of due service thereof, the court shall proceed in a summary manner and in such mode as it may deem advisable to hear the proof and allegations offered in behalf of the petitioner, or the corporation, or other interested party, relative to the subject-matter of inquiry, and if upon such inquiry the court shall be satisfied that the petitioner is the lawful owner of the number of shares of the capital stock, or any part thereof, described in the petition, and that the certificate therefor has been lost or destroyed and cannot, after due diligence, be found, and that no sufficient cause has been shown why a new certificate should not be issued in place thereof, it shall make an order requiring the corporation or other party, within such time as shall be therein designated, to issue and deliver to the petitioner a new certificate for the number of shares of the capital stock of the corporation, which shall be specified in the order as owned by the petitioner, and the certificate for which shall have been lost or destroyed; in making the order the court shall direct that the petitioner deposit such security, or file such bond in such form and with such security as to the court shall appear sufficient to indemnify any person other than the petitioner who shall thereafter appear to be the lawful owner of such certificate stated to be lost or stolen; and the court may also direct publication of such notice, either preceding or succeeding the making of such final order, as it shall deem proper; any person who shall thereafter claim any rights under the certificate so lost or destroyed, shall have recourse to said indemnity, and the corporation shall be discharged from all liability to such person by reason of compliance with the order; and obedience to said order may be enforced by the court by attachment against the officers of the corporation, on proof of their refusal to comply with the same.

XIV. FEES ON FILING CERTIFICATES. SUNDRY PROVISIONS.

114. Fees on filing certificates. On filing any certificate or other paper, relative to corporations, in the office of the secretary of state, the following fees and taxes shall be paid to the secretary of state, for the use of the state: for certificate of incorporation, twenty cents for each thousand dollars of the total amount of capital stock authorized, but in no case less than twenty-five dollars; increase of capital stock, twenty cents for each thousand dollars of the total increase authorized, but in no case less than twenty dollars; consolidation and merger of corporations, twenty cents for each thousand dollars of capital authorized, beyond the total authorized capital of the corporations merged or consolidated, but in no case less than twenty dollars; extension or renewal of corporate existence of any corporation, the same as required for the original certificate of organization by this act; dissolution of corporation, change of name, change of nature of business, amended certificates of organization (other than those authorizing increase of capital stock), decrease of capital stock, increase or decrease of par value or of number of shares, twenty dollars; for filing list of officers and directors, one dollar; filing copy of charter and statement of foreign corporation and issuing certificate of authority to transact business, ten dollars; and for all certificates not hereby provided for, five dollars; provided, that no fees shall be required to be paid by any religious or charitable society or association, or educational association having no capital stock.

115. Surviving incorporators may designate others for organization. When one or more of the commissioners or incorporators of any corporation, created by or under any general or special act, shall have died before the corporation shall have been organized, pursuant to law, the survivors or survivor may in writing designate other persons who may take the place and act instead of those deceased, in the organization; and the organization so effected by their aid shall be as effectual in law as if it had been effected by all the original commissioners or incorporators.

116. Mutual association may create capital stock. The members of any mutual association heretofore or hereafter incorporated, may provide for and create a capital stock of such corporation, upon the consent in writing of all the members of corporation, and may provide for the payment of such stock, and fix and prescribe the rights and privileges of the stockholders therein.

117. Secretary of state to compile and publish list of corporations. The secretary of state shall annually compile from the records of his office, and publish a complete list, in alphabetical order, of the original and amended certificates of incorporation filed during the preceding year, together with the location of the principal office of each in this state, the name of the agent in charge thereof, the amount of the authorized capital stock, the amount with which business is to be commenced, the date of filing the certificate and the period for which the corporation is to continue.

118 Repealer; vested rights not impaired. The act entitled "An act concerning corporations" (Revision), approved April seventh, one thousand eight hundred and seventy-five, and all acts amendatory thereof and supplemental thereto, except so far as herein expressly re-enacted, are hereby repealed; but no existing corporation shall be thereby dissolved, nor shall the powers specified in its charter or certificate of incorporation be thereby impaired or limited, and vested rights acquired under the repealed acts and actually exercised and enjoyed shall not be divested or disturbed, but no special provision relating to taxation, or immunity or exemption therefrom, contained in any special charter, shall be revived or continued by anything in this act; all acts and parts of acts, general and special, inconsistent with this act are hereby repealed; but this repealer shall not revive any act heretofore repealed.

119. Corporations may extend corporate existence. Any corporation, created by special charter, or under a general law, for any objects which are allowed by this act, may extend its corporate existence in the manner prescribed in the twenty-seventh section of this act; provided, that if such corporation possesses franchises, powers, privileges, immunities or advantages which could not be obtained under this act, such extension shall not continue, renew or extend such franchises, powers, privileges, immunities or advantages, but the filing of the certificate of extension shall operate as a waiver and abandonment of such franchises, powers, privileges and advantages. (Added by P. L. 1897, p. 11, c. 1.)

AN ACT TO PROVIDE IN TERMS FOR CUMULATIVE VOTING IN CORPORATIONS
ISSUING OR AUTHORIZED TO ISSUE SHARES OF CAPITAL STOCK.¹

1. Cumulative voting. The certificate of incorporation, original or amended, of any corporation now or hereafter organized under the laws of this state and thereunder issuing or authorized to issue shares of its capital stock, may provide that at all elections of directors, managers or trustees, each stockholder shall be entitled to as many votes as shall

1—Approved March 23, 1900, P. L. 1900, p. 418, c. 172.

equal the number of his shares of stock multiplied by the number of directors, managers or trustees to be elected, and that he may cast all of such votes for a single director, manager or trustee or may distribute them among the number to be voted for, or any two or more of them as he may see fit, which right, when exercised, shall be termed cumulative voting.

2. This act shall not be construed as affecting in any wise the determination of whether or not the right of cumulative voting has been heretofore granted by implication or the right of cumulative voting, if any, granted specifically by special charter or certificate of incorporation.

A SUPPLEMENT TO AN ACT ENTITLED "AN ACT CONCERNING CORPORATIONS" (REVISION OF 1896), APPROVED APRIL TWENTY-FIRST, ONE THOUSAND EIGHT HUNDRED AND NINETY-SIX.¹

1. **Every certificate and report must give address of New Jersey office and name of agent.** Every certificate, report or statement now or hereafter required by any law of this state to be made to any officer or department of this state, or to be published, filed or recorded by any corporation, domestic or foreign, shall, in addition to the other matter required by law, set forth the location (town or city, street and number, if number there be) of its principal office in this state, and the name of the agent therein and in charge thereof, and upon whom process against the corporation may be served; no certificate, statement or report shall hereafter be received, filed or recorded by any officer or in any office of this state unless the same shall comply with the foregoing provisions; such office of any domestic corporation so registered shall be and be deemed the office and post-office address of such domestic corporation, its officers, directors and stockholders, and whenever by the provisions of any law of this state any notice is required to be given to the corporation, its officers, stockholders or directors, such notice shall be sent by mail or otherwise, as the law may require, to such registered office, and such notice so given shall be and be deemed sufficient notice; whenever by any law of this state in any such certificate, report or statement, the residence or post-office address of any incorporator, stockholder, director or other officer is required to be set forth or given, it shall be and be deemed a full compliance with such provision to give as such post-office address, the post-office address of the registered office of the company within this state.

2. **Repealer; time when act takes effect.** All acts and parts of acts inconsistent with this act are hereby repealed, and this act shall take effect May the first, one thousand eight hundred and ninety-eight.

A SUPPLEMENT TO "AN ACT CONCERNING CORPORATIONS" APPROVED APRIL TWENTY-FIRST, ONE THOUSAND EIGHT HUNDRED AND NINETY-SIX.²

1. **Change of location of office.** The board of directors of any corporation, organized under the laws of this state, may change the location of the principal office of such corporation within this state to any other place within this state by resolution adopted at a regular or special meeting of such board, by the votes of at least two-thirds of the mem-

1—Approved April 20, 1898; P. L. 1898, p. 410, c. 173.

2—Approved April 8, 1897, P. L. 1897, p. 175, c. 85.

bers of such board; provided, that no certificate shall be required to be filed of the removal of any office from one point to another in the same town, township or city in this state.

2. Copy of resolution to be filed in office of secretary of state;—fee. Upon the adoption of a resolution as aforesaid, a copy thereof shall be filed in the office of the secretary of state, signed by the president and secretary of such corporation, and sealed with its corporate seal; for filing the said certificate, the secretary of state shall charge a fee of five dollars.

3. Time when act takes effect. This act shall take effect immediately.

A SUPPLEMENT TO "AN ACT CONCERNING CORPORATIONS" (REVISION OF 1896) APPROVED APRIL TWENTY-FIRST, ONE THOUSAND EIGHT HUNDRED AND NINETY-SIX.¹

1. Certain words not to be part of name of corporation. No corporation shall hereafter be organized under the provisions of "An act concerning corporations" (Revision of 1896), approved April twenty-first, one thousand eight hundred and ninety-six, or any amendment thereof or supplement thereto, with the words "insurance" or "safe deposit" or "trust company" or "bank" as a part of its name, and no certificate of incorporation shall be hereafter received for filing or record or be filed or recorded in any office in this state for the purpose of effectuating its incorporation.

2. Corporations already organized not to incorporate certain words in name. No corporation heretofore organized or doing business under the aforesaid act shall, by change or amendment of its name, use the words "insurance" or "safe deposit" or "trust company" or "bank" or any of them as part of its name, and no certificate of change or amendment shall be hereafter received for filing or record or be filed or recorded in any office in this state for the purpose of effectuating such change.

3. Not to apply to corporations heretofore formed. Nothing herein contained shall, however, be construed to apply to or affect the name of any corporation whose certificate of incorporation has heretofore been filed with the secretary of this state.

4. Time when act takes effect. This act shall take effect immediately.

A SUPPLEMENT TO AN ACT ENTITLED "AN ACT CONCERNING CORPORATIONS" (REVISION OF 1896), APPROVED APRIL TWENTY-FIRST, ONE THOUSAND EIGHT HUNDRED AND NINETY-SIX.²

1. Personal liabilities created by statutes of other states not to be enforced in this state. No action or proceeding shall be maintained in any court of this state against any stockholder, officer or director of any domestic corporation for the purpose of enforcing any statutory personal liability of such stockholder, officer or director for or upon any debt, default or obligation of such corporation, whether such statutory personal liability be deemed penal or contractual, if such statutory personal liability be created by or arise from the statutes or laws of any other state or foreign country.

2. No action or proceeding by creditor to enforce liability under foreign statute. No action or proceeding shall be maintained in any court

1—Approved March 30, 1897, P. L. 1897, p. 124, c. 50.

2—Approved April 23, 1897, P. L. 1897, p. 274, c. 155.

of law of this state against any stockholder, officer or director of any domestic or foreign corporation by or on behalf of any creditor of such corporation to enforce any statutory personal liability of such stockholder, officer or director for or upon any debt, default or obligation of such corporation, whether such statutory personal liability be deemed penal or contractual, if such statutory personal liability be created by or arise from the statutes or laws of any other state or foreign country, and no pending or future action or proceeding to enforce any such statutory personal liability shall be maintained in any court of this state other than in a nature of an equitable accounting for the proportionate benefit of all parties interested to which such corporation and its legal representatives, if any, and all of its creditors and all of its stockholders shall be necessary parties.

3. Time when act takes effect. This act shall take effect immediately.

A SUPPLEMENT TO AN ACT ENTITLED "AN ACT CONCERNING CORPORATIONS" (REVISION OF 1896), APPROVED APRIL TWENTY-FIRST, ONE THOUSAND EIGHT HUNDRED AND NINETY-SIX.¹

1. Incorporators may amend certificate of incorporation before payment of capital. It shall be lawful for the incorporators of any incorporation, before the payment of any part of its capital, to record with the clerk of the county in which its original certificate of incorporation was recorded and file with the secretary of state, an amended certificate duly signed by the incorporators named in the original certificate of incorporation, and duly acknowledged or proved as required for certificates of incorporation under the act to which this is a supplement, modifying, changing or altering its original certificate of incorporation, in whole or in part, which amended certificate shall take the place of the original certificate of incorporation, and shall be deemed to have been filed and recorded on the date of the filing and recording of the original certificate; provided, however, that nothing herein shall permit the insertion of any matter not in conformity with the act to which this is a supplement; and provided, however, that this act shall not in any manner affect any proceedings pending in any court; for filing said amended certificate of incorporation, the secretary of state shall charge a fee of twenty dollars; provided, that where the total authorized capital stock of the corporation is increased by said amended certificate the secretary of state shall charge an additional fee of twenty cents for each one thousand dollars of said increase.

[Sections 2, 3 and 4 are amendatory of sections 8, 33 and 34 of the act concerning corporations, *supra*.]

5. Repealer; time when act takes effect. All acts and parts of acts inconsistent with this act are hereby repealed, and this act shall take effect May the first, one thousand eight hundred and ninety-eight.

AN ACT TO AMEND AN ACT ENTITLED "AN ACT CONCERNING CORPORATIONS" (REVISION OF 1896), APPROVED APRIL TWENTY-FIRST, ONE THOUSAND EIGHT HUNDRED AND NINETY-SIX.²

1. [Amendatory of § 16, p. 464, *supra*.]

2. Retirement of preferred stock by issue of bonds; bonds may be converted into common stock. With the consent of two-thirds in interest

1—Approved April 19, 1898, P. L. 1898, p. 407, c. 172.

2—Approved March 28, 1902, P. L. 1902, p. 217, c. 58.

of each class of the stockholders present in person or by proxy at a meeting called in the manner provided in section twenty-seven, every corporation organized under this act that shall have issued preferred stock, entitling the holders thereof to receive dividends at a rate exceeding five per centum per annum, and that shall have continuously declared and paid dividends at such rate, on such preferred stock for the period of at least one year next preceding the meeting, and whose in the certificate thereof filed with the secretary of state, be certified not floating or unfunded debt at the time of the stockholders' meeting shall, to exceed ten per centum of the par amount of the preferred stock then outstanding, and whose assets at such time, after deducting the amount of its indebtedness, shall be certified in the judgment of the officers making such certificate to be at least equal to the amount of preferred stock issued and outstanding, may, with the consent of the holder of any such preferred stock, redeem and retire the preferred stock of such holder, out of bonds or out of the proceeds of bonds of the corporation, bearing interest at a rate not exceeding five per centum per annum, the principal of such bonds being made payable at a date not less than ten years from the date thereof; every corporation organized under this act may, from time to time, in the manner above provided, issue bonds, which, if therein so declared, shall be convertible at par at the option of the holder, into fully-paid common stock of the corporation at par, within any period therein prescribed not less than two years from the issue thereof; and in such case the board of directors may authorize the issue of the common stock into which such bonds, by their terms, shall be convertible.

3. Repealer. All acts and parts of acts inconsistent with this act are hereby repealed.

4. Time when act takes effect. This act shall take effect immediately.

A SUPPLEMENT TO AN ACT ENTITLED "AN ACT CONCERNING CORPORATIONS" (REVISION OF 1896), APPROVED APRIL TWENTY-SIXTH, ONE THOUSAND EIGHT HUNDRED AND NINETY-SIX.¹

1. Proceedings in case of dissenting stockholder. Upon the merger or consolidation of any two or more corporations, which do not have the right to exercise any franchise for public use, into a single corporation as provided by the act to which this act is a supplement, if any stockholder in any of said merging or consolidating corporations not voting in favor of such agreement of merger or consolidation, shall dissent therefrom and shall refuse or neglect to convert his stock into the stock of such consolidated corporation, or to dispose thereof in the manner and on the terms specified in such agreement, such dissenting stockholder may, at any time within thirty days after the adoption and filing of the agreement of consolidation, apply by petition to the circuit court of the county in which the chief office of the corporation, whose stockholder shall so dissent or neglect, was or is located, on reasonable notice to be prescribed by said court to said consolidated corporation for the appointment of three disinterested appraisers to appraise the full market value of his stock without regard to any depreciation or appreciation thereof in consequence of the said merger or consolidation; and thereafter the proceedings and the rights and remedies of the respective parties shall be the same as is provided in the act to which this act is a supplement in the case of the appointment of appraisers to appraise the market value of stock of dissenting stockholders of corporations enjoying the

1—Approved April 10, 1902, P. L. 1902, p. 700, c. 241.

right to exercise any franchise for public use; and the judgment upon the award as provided for therein, shall be a judgment against said consolidated corporation, and shall be a lien on all the property and assets acquired by the consolidated corporation from the corporation so merged, subject only to such liens as existed against said property and assets at the time of such merger or consolidation.

2. Act not to limit or repeal. Nothing herein shall in anywise limit, repeal or supersede the provisions of the one hundred and eighth section of the act to which this is a supplement.

3. Time when act takes effect. This act shall take effect immediately.

SUPPLEMENT TO "AN ACT CONCERNING CORPORATIONS (REVISION OF 1896)," APPROVED APRIL TWENTY-FIRST, ONE THOUSAND EIGHT HUNDRED AND NINETY-SIX.¹

1. Existence of corporation assumed. In every suit or judicial proceeding in this state, to which a corporation is a party, the existence of such corporation shall be taken to be admitted, unless it is put in issue by the pleadings; and in courts in which the practice is that the defendant need not file a plea, the existence of such corporation shall be taken to be admitted unless the party to the suit denying the existence of such corporation shall file with the court an affidavit stating that to the best of his or its knowledge and belief such corporation does not exist.

2. Time when act takes effect. This act shall take effect immediately.

A SUPPLEMENT TO AN ACT ENTITLED "AN ACT CONCERNING CORPORATIONS" (REVISION OF 1896).²

Preamble. Whereas, corporations created years ago for educational purposes may have acquired property which, owing to the successful operation of our state system of public schools, or from other causes, now is and probably, while so held, will continue to be unemployed and useless; and whereas, the stockholders and associate owners of said property are, in some instances, widely scattered and many of them unknown, so that the other owners are unable, without further legislative action, to dissolve such corporation and realize upon and secure to themselves their own property and their lawful rights therein; therefore,

1. Dissolution of incorporated educational institutions; receiver. Whenever in the judgment of the board of trustees or managers of any corporation created by any law of this state for educational purposes, it shall be deemed advisable and for the benefit of said corporation that the same shall be dissolved before the expiration of its charter, it shall be lawful for such board of trustees or managers to wind up and dissolve such corporation, in the manner hereinafter prescribed, or in the name of said corporation, by petition, setting forth the facts and circumstances of the case, to apply to the chancellor for a dissolution of said corporation and for the appointment of a receiver or trustee of its estate and effects; whereupon the chancellor, being satisfied of the sufficiency of said application, shall order such reasonable notice thereof to be served or published as he may judge proper and the circumstances of the case may require, fixing a day, not less than thirty days distant,

1—Approved April 8, 1903, P. L. 1903, p. 490, c. 226.

2—Approved April 2, 1908, P. L. 1908, p. 113, c. 76.

for the hearing upon the same, and if, upon inquiry into the matter, it shall be made to appear to the chancellor that such action may be taken without prejudice to the public welfare, and that it is advisable and best for said corporation that it should be dissolved, its affairs settled and its estate and effects divided and distributed among the stockholders, associate owners, creditors and others who may be entitled to the same, it shall be lawful for the chancellor to enter a decree to that effect, and to appoint a receiver or trustee with full power to demand, sue for, collect, receive and take into possession all the goods and chattels, rights and credits, moneys and effects, lands and tenements, books, papers, choses in action, bills, notes and property of every description belonging to said corporation at the time of said decree of appointment, and to sell, convey or assign all the said real and personal estate; and to pay into the court of chancery all the moneys and securities for money arising from such sales, or which may be collected by said receiver or trustee from time to time under the order of the said court of chancery, first deducting the costs of the proceedings in said court, and making to said receiver or trustee and to counsel such reasonable compensation as the chancellor may deem fit and proper.

2. Further powers of receiver. The said receiver or trustee shall be further clothed with all the powers conferred upon a receiver or trustee appointed under the act authorizing the appointment of a receiver or trustee in case of insolvent corporations; and it shall be lawful for the said court of chancery whether said corporation be dissolved by order of said court or by act of the board of trustees as hereinafter provided, to make all necessary and proper orders and decrees to settle and wind up the affairs of said corporation, and to distribute its estate, property and effects, or the proceeds thereof, among those entitled to the same, and if, at the time of the final decree of distribution, the owners of any part of said property or effects remain unknown, such part, share or shares shall be retained in the court of chancery until the same shall be claimed by the rightful owner or owners thereof.

3 Dissolution by two-thirds consent; consent filed with secretary of state. In the event that such board of trustees or managers shall determine to wind up and dissolve such corporation without the appointment of a receiver therefor, the said board, at a meeting duly called and held for the purpose, of which meeting every trustee or manager shall have received at least three days' notice, shall, by a two-thirds vote of the whole board of trustees or managers adopt a resolution to that effect, and thereupon such trustees or managers, being not less than two-thirds of the whole number, shall signify their consent in writing that such dissolution shall take place, which consent, together with a list of the names and residences of all of the trustees or managers and officers, certified by the president and secretary, shall be filed in the office of the secretary of state, who upon being satisfied by due proof that the requirements aforesaid have been complied with, shall issue a certificate that such consent has been filed, and the board of trustees or managers shall cause such certificate to be published four weeks successively, at least once a week in a newspaper published in the county where the property of such corporation is situate; and upon filing in the office of the secretary of state of an affidavit that said certificate has been so published, the corporation shall be dissolved and the board shall proceed to settle up and adjust its business and affairs, in the same manner and with the same powers and duties as provided in the act to which this is a supplement in cases of other corporations which are dissolved under the provisions of said act.

4. Final settlement. After a sale of the property and assets of such dissolved corporation, and the payment of its debts and all expenses con-

nected with such winding up and settlement, the residue of moneys in hand, if any, shall be distributed and paid in the manner provided in the second section of this act.

5. **Time when act takes effect.** This act shall take effect immediately.

AN ACT TO REPEAL SUNDRY ACTS RELATIVE TO CORPORATIONS.¹
ACTS REPEALED.

1. The act entitled "An act authorizing corporations created by special charters or otherwise to remove their principal office from the place designated in their charters to such other place as may be deemed best by the corporations," approved February twenty-sixth, one thousand eight hundred and eighty, is hereby repealed.

2. The act entitled "An act for the relief of corporations organized under general laws," approved March thirty-first, one thousand eight hundred and seventy-five, is hereby repealed.

3. An act entitled "A further supplement to an act entitled 'An act to prevent fraudulent elections by incorporated companies, and to facilitate proceedings against them,'" approved April fifteenth, one thousand eight hundred and sixty-six, which supplement was approved March seventeenth, one thousand eight hundred and seventy-four, is hereby repealed.

4. The act entitled "An act concerning corporations," approved March second, one thousand eight hundred and eighty-two, and the supplement thereto, approved March twenty-second, one thousand eight hundred and ninety-five, are hereby repealed.

5. The act entitled "An act for the relief of insolvent corporations" approved March twenty-third, one thousand eight hundred and eighty-two is hereby repealed.

6. The act entitled "An act for the relief of the holders of stock of any corporation of this state whose certificates of stock have been lost or destroyed," approved March twenty-eighth, one thousand eight hundred and eighty-two, is hereby repealed.

7. The act entitled "An act to provide for agreements between creditors and insolvent companies," approved May fourteenth, one thousand eight hundred and eighty-four, is hereby repealed.

8. The act entitled "An act relative to the filing of certificates of incorporation," passed April sixth, one thousand eight hundred and eighty-six, is hereby repealed.

9. The act entitled "An act relative to the titles of corporations," approved March seventh, one thousand eight hundred and eighty-eight, is hereby repealed.

10. The act entitled "An act concerning corporations of this state, and of other states doing business in this state," approved April fourth, one thousand eight hundred and eighty-eight, is hereby repealed.

11. The act entitled "An act relating to the consolidation of corporations formed under the act entitled 'An act concerning corporations,' approved April seventh, one thousand eight hundred and seventy-five, and the acts amending and supplementing the same, for the purposes of the improvement and sale of lands, the construction, maintenance and operation of hotels and carrying on the business of an inn-keeper, and the transportation of goods, merchandise or passengers upon land or water," approved April seventeenth, one thousand eight hundred and eighty-eight, is hereby repealed.

1—Approved April 21, 1896, P. L. 1896, p. 323, c. 190.

12. The act entitled "An act to authorize corporations formed under the act entitled 'An act concerning corporations,' approved April seventh, one thousand eight hundred and seventy-five, and the acts amending and supplementing the same, for the purpose of the improvements and sale of lands, or the building, operation and maintenance of hotels and carrying on the business of an inn-keeper, or of the transportation of goods, merchandise or passengers upon land or water, to purchase and hold stock in any one or more of said companies in certain cases," approved April seventeenth, one thousand eight hundred and eighty-eight, is hereby repealed.

13. The act entitled "An act concerning corporations," approved April third, one thousand eight hundred and eighty-nine, and the amendment thereto, approved March twenty-second, one thousand eight hundred and ninety-five, are hereby repealed.

14. The act entitled "An act concerning corporations," passed May twenty-third, one thousand eight hundred and ninety, is hereby repealed.

15. The act entitled "An act to provide a method for appointing commissioners in the place of other commissioners who have deceased or who shall fail to act in certain cases touching the organization of companies, and providing for the organization of companies in certain cases, approved June sixth, one thousand eight hundred and ninety, is hereby repealed.

16. The act entitled "An act to authorize corporations formed for the purpose of constructing or repairing either railroads, water, gas, or electric works, tunnels, bridges, viaducts, canals, hotels, wharves, piers, or any or all such works of internal improvement or public use of utility, to subscribe for, take, pay for in property, materials or service, hold, use and dispose of stock or bonds in any corporation formed for the purpose of constructing, maintaining and operating any such public works," approved April sixth, one thousand eight hundred and ninety-one, is hereby repealed.

17. The act entitled "An act relative to the residence of directors of corporations in this state," approved March tenth, one thousand eight hundred and ninety-two, is hereby repealed.

18. The act entitled "An act concerning corporations," approved March tenth, one thousand eight hundred and ninety-two, is hereby repealed.

19. The act entitled "An act relative to corporations," approved May fifteenth, one thousand eight hundred and ninety-four, and the supplement thereto, approved March fourteenth, one thousand eight hundred and ninety-five, are hereby repealed.

20. The act entitled "An act to secure to laborers and workmen in the employ of corporations a prior lien for wages in cases of insolvency," approved April eighth, one thousand eight hundred and ninety-two, is hereby repealed.

21. Nothing herein shall impair or annul any vested rights, privileges or powers heretofore obtained and used under authority of said acts or any of them, and all corporations which have heretofore availed themselves of the provisions of said acts may continue to enjoy the rights and advantages which they now enjoy and exercise by virtue thereof.

2. GAS COMPANIES.**AN ACT TO AUTHORIZE THE FORMATION OF GAS LIGHT CORPORATIONS AND REGULATE THE SAME.¹**

1. Mode of incorporation. Any number of persons, not less than thirteen, may form a company for the purpose of constructing, maintaining and operating gas works, and for that purpose may make and sign articles of association, in which shall be stated the name of the company, the number of years the same is to continue, the village, town, borough or city, in which it is proposed to supply and distribute illuminating gas, construct, maintain and operate the works, the amount of the capital stock of the company, and the number of shares of which said capital stock shall consist, and the names and places of residence of thirteen directors of the company, all of whom shall be residents of this state, and two-thirds, at least, of whom shall be residents in the particular place where the works are to be erected, who shall manage its affairs for the first year and until others are chosen in their places; each subscriber to such articles of association shall subscribe thereto his name, place of residence and the number of shares of stock he agrees to take in said company; on compliance with the provisions of the next section, such articles of association shall be filed in the office of the secretary of state, who shall endorse thereon the day they are filed and record the same in a book to be provided by him for that purpose; and upon tendering the said articles to the secretary of state to be filed, the persons who have so subscribed such articles of association and all persons who shall become stockholders in such company, shall be a corporation by the name specified in such articles of association. (As amended by P. L. 1902, p. 229, c. 67.)

2. Articles not filed until affidavit of compliance. Such articles of association shall not be filed and recorded in the office of the secretary of state until at least one-half the amount of the entire capital stock is subscribed thereto and twenty per centum paid thereon in good faith, and in cash, to the directors named in said articles of association, nor until there is endorsed thereon or annexed thereto an affidavit, made by at least seven of the directors named in said articles, that the amount of stock required by this section has been in good faith subscribed, and twenty per centum paid in cash thereon as aforesaid, and that it is intended in good faith to erect gas works and manufacture and sell gas to the city, village, borough or town as specified in the articles of association, which affidavit shall be recorded with the articles of association as aforesaid. (As amended by P. L. 1902, p. 229, c. 67.)

3. Certified copy as evidence. That a copy of any article of association filed and recorded in pursuance of this act, or of the record thereof, with a copy of the affidavit aforesaid indorsed thereon or annexed thereto, and certified to be a copy by the secretary of this state, shall be presumptive evidence of the incorporation of such company and of the facts therein stated.

4. Subscriptions; amount of capital. When such articles of association and affidavit are filed and recorded in the office of the secretary of state, the directors named in such articles of association may, in case the whole of the capital stock is not before subscribed, continue to receive subscriptions until the whole capital stock is subscribed; the capital stock of any corporation organized under this act shall not be less than five thousand dollars for every one thousand of the population of the village, town, borough or city in which it is proposed to erect the works

¹—Approved April 21, 1876, P. L. 1876, p. 309, c. 192; G. S., p. 1607.

or to lay pipes in order to supply said village, town, borough or city with illuminating gas; the number of the population to be taken from the latest census of the population, whether the same was made by the general or state government; at the time of subscribing every subscriber shall pay to the directors twenty per centum on the amount subscribed by him, in money, and no subscriptions shall be received or taken without such payment. (As amended by P. L. 1902, p. 229, c. 67.)

5. Election of directors. That there shall be a board of thirteen directors of every corporation formed under this act, to manage its affairs; said directors shall be chosen annually by a majority of the votes of the stockholders voting at such election, in such manner as may be prescribed in the by-laws of the corporation, and they may and shall continue to be directors until others are elected in their places; in the election of directors, each stockholder shall be entitled to one vote for each share of stock held by him; vacancies in the board of directors shall be filled in such manner as shall be prescribed by the by-laws of the corporation; the inspectors of the first election of directors shall be appointed by the board of directors named in the articles of association; no person shall be a director unless he shall be a stockholder, owning stock absolutely in his own right, and qualified to vote for directors at the election at which he shall be chosen; at every election of directors, the books and papers of such company shall be exhibited to the meeting; provided, a majority of the stockholders present shall require it.

6. Officers. That the directors shall appoint one of their number president; they may also appoint a treasurer and secretary, and such other officers and agents as shall be prescribed by the by-laws, and shall establish and fix such salaries to them and to the president as to said board of directors shall appear proper.

7. Payment of subscriptions. That the directors may require the subscribers to the capital stock of the company to pay the amount by them respectively subscribed, in such manner and in such installments as they may deem proper; if any stockholder shall neglect to pay any installment as required by a resolution of the board of directors, the said board shall be authorized to declare his stock, and all previous payments thereon, forfeited for the use of the company; but they shall not declare it so forfeited until they shall have caused a notice in writing to be served on him personally, or by depositing the same in the post-office, properly directed to him at the post-office nearest his usual place of residence, stating that he is required to make such payments at the time and place specified in said notice; and that if he fails to make the same, his stock and all previous payments thereon will be forfeited for the use of the company, which notice shall be served as aforesaid, at least thirty days previous to the day on which such payment is required to be made; provided, that if said company shall not declare such stock forfeited, then such neglecting stockholder shall be individually liable to said company for the amount unpaid upon the stock so held by him, until the whole amount of the capital stock so held by him shall have been paid to the company.

8. Transfer of stock. That the stock of every company formed under this act shall be deemed personal estate, and be transferable in the manner prescribed by the by-laws of the company, but no shares shall be transferable until all previous calls thereon shall have been fully paid in.

9. Proceedings for increasing capital stock. That in case the capital stock of any company formed under this act is found to be insufficient, in the erection of the works and the operating of the same, such company may with the concurrence of two-thirds in amount of all its stockholders, increase its capital stock from time to time, to any amount re-

quired for the purpose of constructing, maintaining and operating its gas works; such increase may be sanctioned by a vote in person or by proxy of two-thirds in amount of all the stockholders of the company, at a meeting of such stockholders called by the directors of the company for that purpose, by a notice in writing to each stockholder, to be served on him personally, or by depositing the same, properly folded and directed to him, at the post-office nearest his usual place of residence, at least twenty days prior to such meeting; such notice must state the time and place of the meeting and its object, and the amount to which it is proposed to increase the capital stock; the proceedings of such meeting must be entered on the minutes of the proceedings of the company; and, thereupon, the capital stock of the company may be increased to the amount sanctioned by a vote of two-thirds in amount of all the stockholders of the company as aforesaid.

10. General powers. That any company organized under this act shall be a body politic and corporate, in fact and in name, by the name stated in the articles of association and by that name have succession, and shall be capable of suing and being sued in any court of law or equity in this state; and they and their successors may have a common seal, and may make and alter the same at pleasure, and they shall by their corporate name, be capable in law of purchasing, holding and conveying any real and personal estate whatever, which may be necessary to enable the said company to carry on the operations named in said articles of association, but shall not mortgage the same or give any lien thereon.

11. Liability of stockholders. That all the stockholders incorporated under this act shall be severally individually liable to the creditors of the company in which they are stockholders to an amount equal to the amount of stock held by them respectively, for all debts and contracts made by such company, until the whole amount of capital stock fixed and limited by such company shall have been paid in, and a certificate thereof shall have been made and recorded as prescribed in the following section, and the capital stock so fixed and limited shall all be paid in, one-half thereof in one year and the other half within eighteen months from the incorporation of said company, or such corporation shall be dissolved.

12. Certificate of payment of capital. That the president and a majority of the directors, within thirty days after the payment of the last installment of the capital stock so fixed and limited by the company, shall make a certificate stating the amount of the capital so fixed and paid in, which certificate shall be signed and sworn to by the president and a majority of the directors, and they shall, within the said thirty days, file the same in the office of the county clerk of the county wherein the business of the said company is carried on.

13. Annual report. That every such company shall make a report annually, within twenty days from the first day of January, which shall be published in some newspaper published in the city, village or town where the business of said company is carried on, of the amount of capital and of the proportion actually paid in, and the amount of its existing debt, which report shall be signed by the president and a majority of the directors, verified by the oath of the president and secretary of the company; and if any company organized under this act shall fail so to do, all the directors of the company failing so to do shall be jointly and severally liable for all the debts of the company then existing, and for all that shall be contracted before such report shall be made.

14. Dividends. That if the directors of any such company shall declare and pay any dividend when the company is insolvent, or any dividend, the payment of which would render it insolvent, or which would

reduce the amount of their capital, they shall be jointly and severally liable for all the debts of the company then existing, and for all that shall be thereafter contracted so long as they shall respectively continue in office; provided, that if any of the directors shall at any time before the time fixed for the payment of such dividend object thereto, and shall, within thirty days thereafter, file a certificate of their objection in writing with the clerk of the company and with the clerk of the county, they shall be exempt from such liability.

15. Liability of officers. That if any certificate report made or public notice given by the officers of any such company, in pursuance of the provisions of this act, shall be false in any material representation, all the officers who shall have signed the same, knowing it to be false, shall be jointly and severally liable for all the debts of the said company while they are stockholders or officers thereof.

16. Stockholders liable to laborers. That the stockholders of any company organized under the provisions of this act, shall be jointly and severally individually liable for debts that may be due and owing to all their laborers, servants and apprentices for services performed for such corporation

17. May make and sell gas. Any corporation formed under this act shall have full power to manufacture and sell and to furnish such quantities of illuminating gas as may be required in the city, town, borough or village where the same shall be located for lighting the streets and public and private buildings, and such corporation shall have power to lay conductors for conducting gas through the streets, lanes, alleys and squares in such city, village, borough or town, having first obtained the written consent of the municipal authorities of said city, village, borough or town, and under such regulations as they may prescribe. (As amended by P. L. 1902, p. 229, c. 67.)

18. Quality of gas to be furnished. That the quality of gas supplied by any company organized under this act shall be, with respect to its illuminating powers, such as to produce from an English parliamentary standard argand burner, known as the London burner for sixteen-candle gas, consuming five cubic feet of gas an hour, a light equal in intensity to the light produced by not less than fourteen sperm candles of six to the pound, each burning one hundred and twenty grains an hour; and such gas shall with respect to its purity, be so far free from sulphuretted hydrogen that it shall not discolor paper imbued with acetate of lead, when these tests are exposed to a current of gas, issuing for thirty seconds, under a pressure of five tenths of water; and shall not contain more than one per cent. of carbonic acid gas, nor more than two per cent. of carbonic oxide gas, nor more than ten per cent. of hydrogen gas, under a penalty of one hundred dollars a day for each and every day that the gas supplied is not in accordance with the requirements of this act, to be sued for and recovered, with costs of suit, on complaint, in any court of competent jurisdiction; the one-half of such penalty to be paid into the treasury and for the use of the town or city where the works of such company are located, the other half to the complainant. (As amended by P. L. 1877, p. 106, c. 70.)

19. Meters to be used. That the meters used by any company, organized under this act, shall register accurately the quantity of gas passing through them, and shall register the quantity of gas passing through them in cubic feet, so that the number of cubic feet of gas consumed can be easily ascertained by the consumer of such gas; and no meter shall be used that may confuse or deceive the consumer as to the number of cubic feet of gas he has consumed, or as to the price he pays for the same, per thousand cubic feet; and it shall not be lawful for any company organized under this act to charge rent on its meters

20. Notice when new mains laid. That whenever any corporation formed under this act, or their servants, agents or workmen, shall dig or sink any trench for laying any new mains or pipes for the conveyance of gas, or other apparatus, near to which any pipe belonging to any water or gas company, owned either by the public or private individuals, for conveying water or gas, or any branch or service pipe for the supply of water or gas to any dwelling-house or buildings, shall be laid, such gas company, their servants, agents or workmen, shall give twenty-four hours' previous notice thereof, in writing, to the president or chief clerk or secretary, or engineer of such water or gas company owned either by the public or private individuals, such notice to be delivered to the principal office of the company, between the hours of ten in the morning and four in the afternoon, and shall, under the inspection of the president or chief clerk, secretary or engineer, or such agent as may be appointed for the time being, of such water or gas company, protect and secure every such water or gas pipe from any injury, and shall also repair any damage that shall be done to such pipe, and in default of repairing such damage, the gas company shall, for each such default, forfeit and pay to the secretary for the time being, of such water or gas company, for the use of such water or gas company, any sum not exceeding twenty-five dollars, and also the costs and expenses which shall have been incurred by the said water or gas company in protecting or securing any such water or gas pipe, or in repairing or making good any injury that may have been done thereto by the means aforesaid, such costs and expenses to be ascertained by any justice, and to be recovered in the same manner as any expenses or penalty under this act may be recovered.

21. Pipes not to interfere with other supply pipes. That all pipes that may be laid by any corporation formed under this act, for the conveyance of gas, shall be laid at the greatest practicable distance from the nearest part of any pipe there laid down by or by order of any water or gas company, owned by the public or private individuals, for the conveyance of water or gas, and shall be laid at a horizontal distance of four feet at least from the nearest part of any such water, or gas pipe, unless in cases where it shall be unavoidably necessary to lay the gas pipe across or nearer to any water or gas pipe, in which case the said gas pipe shall be laid under the said water or gas pipe at the greatest practicable distance therefrom, this distance in no case to be less than twelve inches, and shall form therewith a right angle, or as near thereto as the situation will admit, and in no case shall any pipe be laid or apparatus used that will interfere in any way either with the present or future supply pipes of any water or gas company, or that may interfere with or increase the expense of replacing, removing or repairing the supply pipes or apparatus of any water or gas company; provided, that all gaslight companies now in operation shall have the same rights and privileges of laying their mains and pipes, and making and supplying gas, that their present charters and contracts now give them.

22. Time for laying main pipe. Any company organized under this act that is to supply any city, town, borough or village that is already supplied with gas, shall, within one year after their articles of association have been endorsed by the secretary of state, as provided for in the first section of this act, lay not less than five miles of main pipe and furnish, upon application, to those residing on the streets, lanes or alleys in which the said main pipes may be laid, a full supply of gas, and after the expiration of said year said company shall, within one hundred and twenty days after a written application has been received from any person or persons residing on any of the streets, lanes or alleys of the city, town, borough or village to be supplied by said company, extend their main pipes so as to reach and supply said person or persons with gas,

and the said company shall supply such person or persons with gas, in order that all may enjoy the benefits of competition; provided, that no company organized under this act shall be compelled to lay more than three hundred lineal feet of pipe for each and every person making a written application for gas. (As amended by P. L. 1902, p. 229, c. 67.)

23. Penalties. That any company, association, person or persons, violating or neglecting to comply with any of the provisions of the first or second sections of this act, shall be liable to a penalty of two hundred and fifty dollars for each and every offense, to be sued for and recovered in the name of the state of New Jersey, one-half of which fine, when recovered, shall be paid to the informer, and the other half into the county treasury, where the action shall be tried and conviction had.

24. Repealer. That the act entitled "An act to authorize the establishment and to prescribe the duties of corporations for manufacturing and selling gas in any of the cities and towns of this state," approved March twenty-seventh, eighteen hundred and seventy-four be and the same is hereby repealed.

25. Corporations subject to general laws. That no exclusive privilege heretofore granted in the charter of any company to construct and operate a gas works, shall hereafter continue to be, or be construed to remain exclusive, and that no like franchise hereafter granted shall be or be construed to be exclusive, unless in such grant heretofore made or hereafter to be made it be so expressly provided; all corporations organized under this act shall be subject to all general laws now or hereafter to be passed, regulating gas companies and their operations.

26. Application of repeal. That this act shall be deemed a public act, and shall take effect immediately, and the legislature may alter, amend and repeal the same, but such repeal or alterations shall not affect any corporations heretofore organized, unless the act making such repeal or alteration shall so expressly declare.

A SUPPLEMENT TO THE ACT ENTITLED "AN ACT TO AUTHORIZE THE FORMATION OF GAS LIGHT CORPORATIONS AND REGULATE THE SAME," APPROVED APRIL TWENTY-FIRST, ONE THOUSAND EIGHT HUNDRED AND SEVENTY-SIX.¹

1. When unlawful to refuse to furnish gas. That it shall not be lawful for any gaslight corporation to refuse to furnish or supply gas, to or for any building or premises, by reason of a gas bill remaining unpaid by any previous occupant of said building or premises; provided, the person or persons applying for gas shall not be in arrears to the said gaslight corporation for gas previously furnished to or for said building or premises, or furnished to or for any other building or premises.

2. Time when act takes effect. This act shall take effect immediately.

A SUPPLEMENT TO THE ACT ENTITLED "AN ACT TO AUTHORIZE THE FORMATION OF GASLIGHT CORPORATIONS AND REGULATE THE SAME."²

1. May extend main pipes to neighboring city. That it shall be lawful for any gas company now existing, whether by special charter or by organization under the act to which this is a supplement, or which may

1—Approved March 14, 1879, P. L. 1879, p. 206, c. 120; G. S., p. 1613.

2—Approved March 14, 1879, P. L. 1879, p. 316, c. 187; G. S., p. 1613.

hereafter be organized thereunder, and which may be at any time actually engaged in the manufacture and supply of illuminating gas in the city, town or village, for the supply of which the same was organized or chartered, to extend its main pipes to any neighboring city, town or village wherein no gas company already exists, for the purpose of supplying the same with illuminating gas; provided, the common council, township committee or the municipal authority of such neighboring city, town or village shall grant permission for that purpose.

2. Rights and privileges in such city. That when such permission shall be granted, the said gas company shall have the same rights and privileges of laying gas mains and the like to and in such neighboring city, town or village as it has under its original organization in the city, town or village where it was originally located.

3. Time when act takes effect. That this act shall take effect immediately.

AN ACT TO AMEND AN ACT ENTITLED "SUPPLEMENT TO AN ACT ENTITLED 'AN ACT TO AUTHORIZE THE FORMATION OF GAS LIGHT CORPORATIONS AND REGULATE THE SAME,' " APPROVED APRIL TWENTY-FIRST, ONE THOUSAND EIGHT HUNDRED AND SEVENTY-SIX, WHICH SUPPLEMENTAL ACT WAS APPROVED MARCH TWENTY-EIGHTH, ONE THOUSAND EIGHT HUNDRED AND NINETY-ONE.¹

1. Act amended. The supplement to an act entitled "An act entitled 'An act to authorize the formation of gas light corporations and regulate the same, approved April twenty-first, one thousand eight hundred and seventy-six,'" which supplement was approved March twenty-eighth, one thousand eight hundred and ninety-one, be and the same is hereby amended to read as follows:

1. Gas companies organized under the act to which this is a supplement and operating in cities, villages, townships and boroughs shall have power to mortgage any of their property, real or personal, including their franchises, when necessary to enable said companies to carry on the operations for which said companies are organized.

2. This act shall take effect immediately.

A SUPPLEMENT TO AN ACT ENTITLED "AN ACT TO AUTHORIZE THE FORMATION OF GAS LIGHT CORPORATIONS AND REGULATE THE SAME" (REVISION), APPROVED APRIL TWENTY-FIRST, ONE THOUSAND EIGHT HUNDRED AND SEVENTY-SIX.²

1. How capital stock reduced. Any corporation organized under the act to which this is a supplement, may by resolution of its board of directors and the consent in writing of at least two-thirds in interest of its stockholders, reduce the amount of its capital stock or change the number or the par value of its shares or any or all of these purposes, whenever it shall ascertain after the building of its works, that the full amount of capital stock named in said certificate of incorporation is not needed to build, equip and put in operation its gas works; provided a certificate of such change verified under the corporate seal of said company and the affidavit of its president and secretary be filed in the office of the secretary of state and published for three weeks once in each week, in a newspaper printed or circulated in the county where said company shall have its principal office.

1—Approved March 28, 1897, P. L. 1897, p. 202, c. 110.

2—Approved March 15, 1900, P. L. 1900, p. 52, c. 32.

A SUPPLEMENT TO AN ACT ENTITLED "AN ACT TO AUTHORIZE THE FORMATION OF GAS LIGHT CORPORATIONS AND REGULATE THE SAME," APPROVED APRIL TWENTY-FIRST, ONE THOUSAND EIGHT HUNDRED AND SEVENTY-SIX.¹

1. Right to mortgage. Gas companies now or hereafter organized under the act to which this is a supplement shall have power to mortgage any or all of their property, real or personal, including their franchises, when necessary to enable said companies to carry on the operations of the said companies.

2. All acts and parts of acts inconsistent herewith are hereby repealed.

AN ACT TO ENABLE GAS LIGHT COMPANIES, INCORPORATED UNDER THE LAWS OF THIS STATE, TO INCREASE THEIR BONDED INDEBTEDNESS.²

1. How bonded indebtedness increased. That whenever it may be necessary for any gaslight company, incorporated under the laws of this state, to increase their bonded indebtedness, for the purpose of increasing their business or for any other purpose, then and in that case the said corporation, by a majority vote of its board of directors, after having obtained the consent of a majority of the stockholders representing at least sixty (60) per cent. of the capital stock, be and they are hereby authorized to increase said bonded indebtedness to any amount not exceeding two-thirds of the amount of the capital stock of said company, the said increase as aforesaid to be governed by the law and pursued under the mode directed by the act of incorporation of such gaslight company.

2. Time when act takes effect. That this act shall take effect immediately.

AN ACT AUTHORIZING GAS COMPANIES TO INCREASE THEIR CAPITAL STOCK.³

1. How capital stock increased. That in case the capital stock of any gas company incorporated under the laws of this state by special act of incorporation, is found to be insufficient in the erection of the works and the operating of the same, such company may, with the concurrence of two-thirds in amount of all its stockholders, increase its capital stock from time to time to any amount required for the purpose of constructing, maintaining and operating its gas works; such increase may be sanctioned by a vote, in person or by proxy, of two-thirds in amount of all the stockholders of the company, at a meeting of such stockholders, called by the directors of the company for that purpose, by a notice in writing to each stockholder, to be served personally or by depositing the same, properly folded and directed, at the post-office nearest such stockholder's usual place of residence, at least twenty days prior to such meeting; such notice must state the time and place of the meeting and its object, and the amount to which it is proposed to increase the capital stock; the proceedings of such meeting must be entered on the minutes of the proceedings of the company, and thereupon the capital stock of

1—Approved April 3, 1902, P. L. 1902, p. 277, c. 99.

2—Approved March 27, 1878, P. L. 1878, p. 173, c. 111; G. S., p. 1613.

3—Passed February 23, 1886, P. L. 1886, p. 47, c. 33; G. S., p. 1614.

the company may be increased to the amount sanctioned by a vote of two-thirds in amount of all the stockholders of the company as aforesaid.

2. Time when act takes effect. That this act shall take effect immediately.

AN ACT RELATING TO CORPORATIONS OF THIS STATE NOW OR HEREAFTER HAVING LAWFUL AUTHORITY TO LAY OR MAINTAIN PIPES OR MAINS IN THE STREETS OR PUBLIC PLACES OF ANY MUNICIPALITY FOR THE DISTRIBUTION OF GAS.¹

1. Piping gas to other municipalities. Any corporation of this state, now or hereafter having lawful authority to lay or maintain pipes or mains in the streets and public places of any municipality for the distribution of gas, may use its pipes or mains within such municipality for the transmission of gas to any other municipality, in the streets or public places of which it may also have lawful authority to lay or maintain pipes or mains for the distribution of gas; nothing herein contained shall grant to any corporation a franchise or right to lay down gas pipes for the distribution of gas in any municipality of this state.

3. LAND IMPROVEMENT COMPANIES.

AN ACT TO ENCOURAGE THE IMPROVEMENT OF REAL PROPERTY IN THIS STATE.²

1. Real property improvement companies; formation and filing certificate. That it shall and may be lawful for any number of persons not less than five, to associate themselves into a company for the purpose of buying, selling, settling, owning and improving real estate, and erecting buildings and other structures thereon, within this state, upon making a certificate in writing under their hands and seals, setting forth,

I. The corporate name which they propose to assume;

II. The names of the places in which the said real estate is situated;

III. The total amount of the capital stock of said company, which shall be divided into shares of fifty dollars each;

IV. The names and residences of the stockholders, and the number of shares held by each;

Which certificate shall be proved and acknowledged, and recorded in a book to be kept for that purpose in the office of the clerk of the county or counties in which said real estate shall be situated, and after being so recorded shall be deposited and filed in the office of the secretary of state, and a copy thereof, duly certified by such secretary, shall be evidence for or against such company; and upon the making and filing of said certificate, such company shall be deemed and taken to be a corporation in fact and in law, with all the powers conferred in the first section of the act concerning corporations.

2. Election of directors. That the business of such company shall be managed by a board of one president and four directors, a majority of whom shall be residents of this state; as soon as the capital stock shall have been subscribed, the stockholders or a majority of them, shall, at such time as they shall agree upon, proceed to choose five directors, who shall choose one of their number president, and shall hold their of-

1—Approved April 8, 1903, P. L. 1903, p. 359, c. 179.

2—Revision—Approved March 27, 1874; G. S., p. 1905.

five for one year, and until others are duly chosen, and thereafter the said directors and president shall be chosen in such manner and at such time as the by-laws may direct.

3. Capital stock and its payment. That the capital stock of every such company shall be paid in at such times, upon such notice, and in such manner and installments as the directors of said company by their by-laws or otherwise may direct, and such payment shall be made either in money or in land, situated in places named in the said certificate, the land to be appraised by the board of directors, and taken at such value by said company on such terms as may be agreed upon, and in case of the failure of any stockholder to pay his or her installment at the place and within thirty days of the time appointed for the payment thereof, such stockholder shall incur a forfeiture of his or her shares, and of all previous payments thereon, for the use of said company.

4. Transfer of stock. That the capital stock of said company shall be deemed personal property, and the said shares shall be transferable only on the books of said company, in such manner as the board of directors by by-laws may direct, and every share shall entitle the holder to one vote either in person or by proxy.

5. Parents, guardians and trustees may hold shares. That parents or guardians may take and hold shares in behalf of their minor children or wards, and trustees in behalf of married or single women, and may act in such association in behalf of those they represent.

6. Power to adopt constitution and by-laws. That the association may adopt such form of constitution and by-laws, not repugnant to the constitution of this state or the United States, as to them shall seem right and proper, and may alter and amend the same from time to time, in the manner therein provided.

7. Powers of company. That such company, by its corporate name, so as aforesaid certified, shall be capable of purchasing, holding and conveying lands and tenements, goods and chattels, and of doing and performing all other acts and things necessary or proper for accomplishing the objects of such company contemplated by this act; they may purchase land and issue bonds, secured by mortgage, in payment of such portion of the purchase money as it may not be convenient to pay in cash, but at no time shall the amount of land held by such company exceed twenty-five thousand acres; and they may sell and dispose of their said lands in convenient quantities to settlers and others, at fair and reasonable prices, and on fair and reasonable terms; or they may sell the said lands in shares and issue certificates therefor, each share when full paid entitling the holder to a certain portion of land not exceeding one hundred acres, and to the occupancy of said lands under such restrictions and regulations as may be adopted by the association after payment of a portion of the installments; and no premium given for priority of choice of land or for loans or discount on the redemption of shares or bonds shall be deemed to be usurious.

8. Power to receive title to land. That as soon as any such company shall be organized, it shall be authorized to receive conveyances for the lands which it is intended to purchase, and to hold, and execute all instruments and conveyances necessary in the purchase, sale or mortgage of such property.

9. Authorized to improve lands. That the said company are authorized to improve all and every portion of such lands held or purchased by them as aforesaid, by erecting, building and laying out said lands into lots, streets, squares, docks, lanes, alleys or other divisions, and by levelling, grading, raising or tunneling the said land, streets, lanes and alleys, and may build, enlarge, and improve all and any structures which they may deem necessary for the purposes of their organization.

10. Power to borrow money on mortgage. That if the capital of such company shall not be sufficient to buy the land and build and improve the same as hereinbefore provided; it shall be lawful for any such company to borrow money at any rate of interest not exceeding seven per centum per annum, for such purposes, and to mortgage their entire property therefor; provided, that the mortgage shall at no time exceed the capital paid in of said company.

11. Restrictive clauses against nuisances. That all deeds of conveyance of lands or tenements granted by any company formed in pursuance of this act shall be held to be valid and binding, with any restrictive clauses against nuisances, unless the same be contrary to the constitution or laws of this state.

12. Investment of funds. That the funds of such company, after payment of expenses, shall be invested in the purchase or payment of the bonds secured by mortgage as aforesaid, or in loans to actual settlers, to assist them in improving the lands sold or disposed of to them, but no dividend or division of the profits shall be made until all the said bonds are paid.

13. By-laws. That all matters not herein provided for shall be regulated by the constitution and by-laws of said company.

14. Annual statement. That every such company shall furnish to the secretary of state, when by him required, an annual statement of the condition and business of the company, duly attested under oath or affirmation by the proper officers of the company.

15. Corporations organized or specially incorporated for either purposes of this act may file certificate, etc. That any corporation organized under or specially incorporated by any law of this state, for either of the purposes mentioned in the first section of this act, with the written consent of three-fourths in amount of its stockholders, duly acknowledged as in conveyances of land, may file their certificate, under their corporate seal, signed by their president and directors, with such written consent in the office of the secretary of state, thereby declaring their desire that said corporation shall be possessed of the powers and subject to the provisions of this act; and it shall be the duty of said secretary of state to record the same, whereupon the said corporation shall be thereafter possessed of all the powers conferred by this act, and subject to its provisions, as fully as if originally organized under the same.

16. Legislature may repeal or amend. That the legislature may at any time repeal or amend this act, or annul the charter of any association created under the same.

SUPPLEMENT.¹

17. Sec. 1. To have powers conferred in section 1 of act concerning corporations. That all corporations organized now or hereafter under the act to which this is a supplement, shall have and possess all powers conferred in the first section of the "act concerning corporations," passed at the present session of the legislature, anything in any other law to the contrary notwithstanding.

1—Revision—Approved April 9, 1875, G. S., p. 1908.

A FURTHER SUPPLEMENT TO THE ACT ENTITLED "AN ACT TO ENCOURAGE THE IMPROVEMENT OF REAL PROPERTY IN THIS STATE" (REVISION), APPROVED MARCH TWENTY-SEVENTH, EIGHTEEN HUNDRED AND SEVENTY-FOUR.¹

1. How land improvement companies may invest surplus. That all land improvement companies of this state now existing under any act of the legislature, or that are now or may hereafter be organized under the act to which this is a supplement, shall have and possess the power, when three-fourths of all the directors of such company shall vote therefor, to temporarily invest the proceeds of the sale of the real and personal property of said company and its accumulated surplus in any public stock or bonds of the United States, or of any state or municipal corporation therein, and in any stock or bonds of any corporation created by or under the laws of the states of New Jersey, New York or Pennsylvania; and said land improvement companies, to enable them to make such investments as aforesaid, may, by a three-fourths vote of their directors, purchase, hold and sell any of said stocks or bonds, public or private, whenever they deem it for the best interests of the corporation so to do.

2. Time when act takes effect. That this act shall take effect immediately.

A FURTHER SUPPLEMENT TO AN ACT ENTITLED "AN ACT TO ENCOURAGE THE IMPROVEMENT OF REAL PROPERTY IN THIS STATE" (REVISION), APPROVED MARCH TWENTY-SEVENTH, ONE THOUSAND EIGHT HUNDRED AND SEVENTY-FOUR.²

1. Corporations may increase capital stock and file additional certificate. That all corporations organized now or hereafter under the act to which this is a further supplement, may, at any meeting of the stockholders called for that purpose, increase the capital stock and the number of shares therein until it shall reach the amount named in the original certificate, and in case more capital is necessary, an additional certificate shall be filed, under the hands and seals of two-thirds in interest of the stockholders, or their legal representatives, stating the amount of such additional capital required, which shall be proved or acknowledged and recorded in the manner heretofore provided for in this act; provided, that for all stock issued under such supplemental certificates, such corporation, its directors and stockholders, shall be entitled to all the benefits and subject to all the liabilities contained in said act.

2. Time when act takes effect. That this act shall take effect immediately.

SUPPLEMENT TO AN ACT ENTITLED "AN ACT TO ENCOURAGE IMPROVEMENT OF REAL PROPERTY IN THIS STATE" (REVISION), APPROVED MARCH TWENTY-SEVENTH, ONE THOUSAND EIGHT HUNDRED AND SEVENTY-FOUR.³

1. Purposes for which associations may be formed. That it shall and may be lawful for any number of persons, not less than five, to associate themselves into a company for the purpose of improving, preserving, pro-

1—Approved April 13, 1876, P. L. 1876, p. 138, c. 105; G. S., p. 1908.

2—Approved February 10, 1880, P. L. 1880, p. 25, c. 14; G. S., p. 1908.

3—Approved March 6, 1886, P. L. 1886, p. 76, c. 58; G. S., p. 1908.

tecting and beautifying any sidewalks and highways in any district or territory in any township in this state, and for the purpose of planting, cultivating and maintaining shade trees or ornamental trees along or on the same upon making a certificate in writing under their hands and seals setting forth:

I. The corporate name which they propose to assume;

II. The boundaries of the district or territory in which such sidewalks or highways are or may be;

III. The names and residences of the members and stockholders of such association, and the number of shares held by each one;

IV. The total amount of the capital stock of said company, which shall be divided into shares of ten dollars each, which certificate shall be proven or acknowledged and recorded in the clerk's office of the county in which such district or territory is situate, and said certificate so recorded, or a copy thereof duly certified by such clerk, shall be evidence for or against said company in all courts, and upon making and recording said certificate as aforesaid, such company shall be deemed and taken to be a corporation in fact and in law, with all the powers conferred in the first section of the act concerning corporations.

2. Moneys subscribed, how used and applied. That all moneys subscribed by the members of said association, or received in any way by said association, shall be used and applied, as far as practicable, towards the making, maintaining, preserving and beautifying said sidewalks and highways, in accordance with the purposes aforesaid specified in such certificate, but nothing herein contained shall be construed to permit any unnecessary obstruction to the public travel in any of said highways at any time.

3. Time when act takes effect. That this act shall take effect immediately.

AN ACT TO ENCOURAGE LAND IMPROVEMENT COMPANIES ORGANIZED UNDER SPECIAL LAWS OF THIS STATE.¹

1. Companies may hold other lands than those authorized by special charter. That any land improvement company organized under special charter of this state shall be and is hereby authorized and empowered, from time to time, to purchase, take and hold any other lands in this state in addition to the lands now held or authorized to be held by its charter, and to improve, mortgage, lease, sell and dispose of the same in the same manner as is authorized by the act of incorporation of such company or any supplement thereto; provided, nevertheless, that such company shall not purchase any such additional land by virtue of this act without the written consent of the stockholders representing a majority of the stock of such company for that purpose.

2. May borrow money. That any such land improvement company shall have the power, in addition to that already conferred, to borrow from time to time, upon its promissory note, bond or other obligation, any sum or sums of money for the uses and purposes of said company; provided, that said indebtedness shall not, at any one time, exceed the amount of its paid in capital in cash; and provided further, that this act shall not repeal or abridge any rights, powers or privileges conferred upon any such company by its original charter or any acts supplemental thereto.

3. Time when act takes effect. This act shall be a public act and shall take effect immediately.

¹—Approved March 9, 1877, P. L. 1877, p. 216, c. 136; G. S., p. 1909.

AN ACT TO ENABLE THE CORPORATORS OF LAND COMPANIES THAT HAVE NOT ORGANIZED UNDER THEIR CHARTERS TO CHANGE THE TITLES OF SAID COMPANIES.¹

1. Corporations may change name. That it shall be lawful for the corporators of any land company chartered by the legislature of New Jersey to change the title of their company as they may elect; provided, no organization has already been effected under their charter; and provided, notice of said change of name be filed with the secretary of state within thirty days after such change.

2. Repealer. That all acts and parts of acts inconsistent with this act are hereby repealed.

3. Time when act takes effect. That this act shall take effect immediately.

4. NAVIGATION COMPANIES.

AN ACT FOR THE INCORPORATION OF COMPANIES TO NAVIGATE LAKES, OCEAN, AND INLAND WATERS (REVISION).²

1. How incorporated. That at any time hereafter, any five or more persons, who may desire to form a company for the purpose of building for their own use, equipping, furnishing, fitting, purchasing, chartering, or owning steam, sail, or other boats, ships or vessels, or property to be used in lawful business, commerce, trade, or navigation upon ocean or inland waters, and for the carriage, transportation, storing, or lading of freight, mails, property, or passengers, may make, sign, and acknowledge before some officer competent to take the acknowledgment of deeds, and file in the office of the clerk of the county in which the principal office for the management of the business of the company shall be situated, and a duplicate thereof in the office of the secretary of state, a certificate in writing, in which shall be stated the corporate name of such company, and the specific objects for which the company shall be formed, stating particularly the amount of capital stock of said company, which shall not be more than one million dollars, nor less than ten thousand dollars; the term of its existence not to exceed twenty years; the number of shares of which the said stock shall consist, the number of directors and their names, who shall manage the affairs of such company for the first year, and the name of the city or town and county in which the principal office for managing the affairs of such company is to be situated.

2. Powers of company. That when the certificate shall have been filed as aforesaid, and twenty per centum of the capital named paid in, the persons who shall have signed and acknowledged such certificate, and all others who thereafter may be holders of any share or shares of the capital stock, and their successors, shall be a body politic and corporate, in fact and in name, by the name stated in such certificate, and by that name shall have succession, and shall be capable of suing and being sued in any court of law or equity; and they and their successors may have a common seal, and may make and alter the same at pleasure; and they shall by their corporate name be capable in law of purchasing, holding, owning, hiring, leasing and conveying any real or personal estate or property whatever, which may be necessary to enable such company to carry on the operations and business mentioned in such certificate, and all other real or personal estate or property which shall have been bona

1—Approved March 10, 1880, P. L. 1880, p. 167, c. 126; G. S., p. 1909.

2—Revision—Approved April 9, 1875; G. S., p. 2316.

file mortgaged or pledged to such company, by way of security, or conveyed to such company in satisfaction or part satisfaction of any debt or debts previously contracted in the course of the transaction of the business of such company, and all other real or personal estate or property which shall be purchased by such company at sales upon judgments, orders or decrees which shall be obtained for such debts, or in the course of the prosecution thereof.

3. Officers and election. That the stock, property, affairs and concerns of such company shall be managed by not less than three or more than thirteen directors, who shall respectively be stockholders of such company, a majority of whom shall be residents of this state, and who shall, except those for the first year, be annually elected by the stockholders of such company, at such time and place as shall be directed by the by-laws of such company; public notice of the time and place of holding such election shall be published not less than thirty days previous thereto, in a newspaper printed in the city or town in which the principal office for the management of the affairs of such company shall be situated; and if there be no newspaper published in such city or town, then in the newspaper the principal office of publication of which is nearest to such principal office of such company; such elections shall be made by such of the stockholders as shall attend for that purpose, either in person or by proxy; and such elections shall be by ballot, and each stockholder shall be entitled to as many votes as he owns shares of stock in such company; and the persons receiving the greatest number of votes shall be directors; and when any vacancy shall happen among the directors, occasioned by death, incapacity, resignation, the sale of stock or otherwise, it shall be filled for the remainder of the year in such manner as may be provided for by the by-laws of such company; the directors named in the certificate aforesaid shall appoint inspectors of the first election from among stockholders who are not directors.

4. No dissolution on failure to hold election. That in case it shall happen at any time that an election of directors shall not be made on the day designated by the by-laws of such company, when it ought to have been made, the company for that reason shall not be dissolved, but it shall be lawful on any other day to hold an election for directors in such manner as shall be provided for by the said by-laws; and all acts of directors shall be valid and binding as against such company until their successors shall be elected.

5. Directors may appoint officers. That the directors of such company shall have power to appoint a president, and to appoint or employ such other subordinate officers as the by-laws of such company may designate, and to require any or all of such president and other officers to give such security for the faithful performance of their respective duties as such directors may require; and the directors shall have power to remove such president and other officers respectively at pleasure; such officers shall respectively, have such powers and perform such duties in the management of the property, affairs, and concerns of such company, subject to the control of the directors, as the by-laws of such company shall prescribe; a majority of the directors for the time being shall constitute a quorum for the transaction of business.

6. How subscriptions collected. That it shall be lawful for the directors to call in and demand from the stockholders respectively, all such sums of money by them subscribed, at such times and in such payments or installments as the directors shall deem proper, under the penalty of forfeiting the shares of stock subscribed for, and all previous payments made thereon, if payment shall not be made by stockholders within sixty days after demand or notice requiring such payment shall have been published three successive weeks, as is prescribed in section three; but

the collection by action of any installment shall preclude the company from forfeiting any stock by reason of the non-payment of such installment.

7. Directors may make by-laws. That the directors shall have power to make such reasonable by-laws, not inconsistent with the laws of this state or of the United States, as they shall deem proper for the management and disposition of the property, affairs, and concerns of such company, for prescribing the powers and duties of the officers of such company, for the appointment of such officers, and for the transaction and carrying on the business of such company.

8. Transfer of stock. That the stock of such company shall be deemed personal estate, and shall be transferable in such manner as shall be prescribed by the by-laws of such company, but no shares shall be transferable until all previous calls thereon shall have been fully paid in; and it shall not be lawful for any such company to use any of its funds in the purchase of any stock in any other corporation formed under the laws of this state, or to hold the same unless the same shall have been bona fide pledged, hypothecated or transferred to such company by way of security for, or in satisfaction or part satisfaction of a debt or of debts previously contracted in the course of the transaction of the business of such company, or unless the same shall be purchased by such company at sales upon judgments, orders or decrees which shall be obtained for such debts, or in the course of the prosecution thereof.

9. Certificate of incorporation as evidence. That the copy of any certificate of incorporation filed in pursuance of this act, certified by the county clerk in whose office the same is filed, under his official seal, to be a true copy of and of the whole of such certificate, shall be received in all courts and places as presumptive legal evidence of the matters therein stated.

10. Stockholders liable to creditors. That the stockholders of such company shall be jointly, severally and individually liable to the creditors of such company to an amount equal to the amount of stock held by them respectively, for all debts and contracts made by such company, and for all claims and demands against such company, until the whole amount of capital stock fixed and limited by such company shall have been paid in, and a certificate thereof shall have been made and recorded as prescribed in the following section; and the capital stock so fixed and limited shall all be paid in, at least one-half thereof within one year, and the remainder within two years from the incorporation of such company, or such company shall be dissolved.

11. Certificate of payment of capital to be filed. That the president and a majority of the directors of such company, within thirty days after payment of the last installment of the capital stock so fixed and limited by such company, shall make a certificate stating the amount of the capital stock of such company so fixed, limited and paid in, which certificate shall be signed and sworn to by the president and a majority of the directors of such company, and they shall within the said thirty days procure the same to be recorded in the office of the clerk of the county in which is located the principal office of such company.

12. Limitation of personal liability of stockholders. That no stockholder shall in any case be personally liable for the payment of any debt contracted by, or claim or demand against such company, unless an action for the collection of such debt, claim or demand shall be brought against such company within two years after the same shall have become due or shall have accrued; and no action or proceeding shall be brought or maintained against any stockholder in such company for any such debt, claim or demand, until an execution against the property of such

company therefor shall have been returned unsatisfied in whole or in part.

13. Directors liable for debts. That if the directors of any such company shall declare and pay any dividend when such company is insolvent, or any dividend, the payment of which would render it insolvent, or which would diminish the amount of its capital stock, they shall be jointly and severally liable for all the debts of such company then existing, and for all claims and demands against such company then existing, and for all debts, claims and demands thereafter contracted or incurred while they shall respectively continue in office; provided, that if any of the directors shall object to the declaring of such dividend, or to the payment of the same, and shall at any time before the time fixed for the payment thereof, or within thirty days after such dividend is declared, file a certificate of his or their objection in writing, with the secretary of such company, if there be such an officer, and if not, then with the president thereof, and with the clerk of the county in which the principal office of such company shall be situated, the director or directors so objecting, and so filing such objection, shall be exempt from such liability.

14. Persons signing false certificate liable to creditors. That if any certificate made in pursuance of the provisions of this act shall be false in any material representation, all the officers who shall have signed the same shall be jointly and severally liable for all the debts and liabilities of the company, contracted or incurred while they are stockholders or officers thereof.

15. Guardians, trustees, etc., not liable personally. That no person holding stock in any such company, as executor, administrator, guardian or trustee, and no person holding such stock as collateral security, shall be personally subject to any liability as stockholder of such company, but the person pledging such stock shall be considered as holding the same, and shall be liable as a stockholder accordingly, and the estate and funds in the hands of such executor, administrator, guardian or trustee shall be liable in like manner and to the same extent as the testator or intestate, or the ward or person interested in such trust fund would have been if he had been living and competent to hold the same stock in his own name.

16. Stockholders liable for workmen's wages. That the stockholders of such company shall be jointly, severally and individually liable for all debts that may be due and owing to all the laborers and mechanics of such company for services performed for such company; which debts so due shall be paid out of the first assets realized from said company or said stockholders; but no action or proceeding shall be brought or maintained against any stockholder for any such debt until an execution against the property of such company shall have been returned unsatisfied, in whole or in part.

17. Capital may be increased or diminished. That any company which may be formed under this act may increase or diminish its capital stock by complying with the provisions of this act, but such increase shall not be a sum more than the larger sum specified in the first section, and such diminution shall not be to a sum less than the smaller sum specified in said first section; before such company shall be entitled to diminish the amount of its capital stock, if the amount of its debts and liabilities shall exceed the amount of capital stock to which it is proposed to be reduced, such amount of debts and liabilities shall be satisfied and reduced so as not to exceed such diminished amount of capital stock.

18. Notice of meeting to increase or diminish stock. That whenever any such company shall desire to call a meeting for the purpose of in-

creasing or diminishing the amount of its capital stock, it shall be the duty of the directors to publish a notice signed by at least a majority of them, at least six successive weeks, as is prescribed in section three, previous to the day fixed upon for holding such meeting, specifying the object of such meeting, the time and place when and where such meeting shall be held, and the amount to which it shall be proposed to increase or diminish the capital stock; a vote of at least two-thirds of all the shares of stock shall be necessary to an increase or diminution of the amount of the capital stock.

19. Proceedings at meetings. That if at any time and place specified in the notice provided for in the last preceding section, stockholders shall appear in person or by proxy, in numbers representing not less than two-thirds of all the shares of the stock of the company, they shall organize by choosing one of the directors chairman of the meeting, and also a suitable person for secretary, and proceed to a vote of those present, in person or by proxy, and if on canvassing the votes it shall appear that a sufficient number of votes has been given in favor of increasing or diminishing the amount of capital, a certificate of the proceeding, showing a compliance with the provisions of this act, the amount of capital actually paid in, the whole amount of debts and liabilities of the company, and the amount to which the capital stock shall be increased or diminished, shall be made out, signed, verified by the affidavit of the chairman, and be countersigned by the secretary, and such certificate shall be acknowledged by the chairman and filed as required by the first section of this act; and when so filed, the capital stock of such company shall be increased or diminished to the amount specified in said certificate.

20. Book of registry of stock to be kept. That it shall be the duty of the directors of every such company to cause a book to be kept by the treasurer or secretary thereof, containing the names of all persons alphabetically arranged, who are or shall within six years, have been stockholders of such company, and showing their places of residence, the number of shares of stock held by them respectively, and the time when they respectively became owners of such shares, and the amount of stock actually paid in; which book shall, during the usual business hours of the day, on every day except Sunday, the fourth day of July, the twenty-fifth day of December, and the first of January, be open for the inspection of stockholders and creditors of the company and their personal representatives, at the principal office of such company; and any and every such stockholder, creditor, or representative shall have a right to make extracts from such book; and no transfer of stock shall be valid for any purpose whatever, except to render the person to whom it shall be transferred liable for the debts and liabilities of the company, according to the provisions of this act, until it shall have been entered therein as required by this section, by an entry showing to and from whom transferred; such book shall be presumptive evidence of the matters therein stated in favor of the plaintiff, in any action or proceeding against such company, or against any one or more stockholder; every officer or agent of such company whose duty it shall be to keep such book, who shall neglect any proper entry in such book, or shall refuse or neglect to exhibit the same, or allow the same to be inspected or extracts to be taken therefrom, as provided by this section, shall be deemed guilty of a misdemeanor, and the company shall forfeit and pay to the party injured a penalty of fifty dollars for every such neglect or refusal, and all damages resulting therefrom; and every company that shall neglect to keep such book open for inspection as aforesaid, shall forfeit and pay the sum of fifty dollars for every day it shall so neglect,

to be sued for and recovered in the name of the collector of the county in which the principal office for the transaction of the business of such company shall be located, and when so recovered, the amount shall be paid into the treasury of such county for the use thereof.

5. PARTNERSHIP ASSOCIATIONS.

AN ACT AUTHORIZING THE FORMATION OF PARTNERSHIP ASSOCIATIONS, IN WHICH THE CAPITAL SUBSCRIBED SHALL ONLY BE RESPONSIBLE FOR THE DEBTS OF THE ASSOCIATION, EXCEPT UNDER CERTAIN CIRCUMSTANCES.¹

1. Three or more persons may form partnership association. That when any three or more persons may desire to form a partnership association, for the purpose of conducting any lawful business or occupation within the United States or elsewhere, whose principal place of business shall be established and maintained within this state, by subscribing and contributing capital thereto, either in money or in real or personal estate, mines or other property, at a valuation to be approved by all the members subscribing to the capital of such association, which capital shall alone be liable for the debts of such association, it shall and may be lawful for such persons to sign and acknowledge, before some officer competent to take the acknowledgment of deeds, a statement in writing, in which shall be set forth the full names of such persons and the amount of capital of said association subscribed for by each, the character of the subscription, and if in property other than cash the description and valuation of said property, the total amount of capital, and when and how to be paid, the character of the business to be conducted and the location of the same; the name of the association with the word "limited" added thereto as part of the same, the contemplated duration of said association, which shall not, in any case, exceed twenty years, and the names of the officers of said association, selected in conformity with the provisions of this act; and any amendment of said statement shall be made only in like manner, which said statement and amendment shall be recorded in the office of the clerk or recorder of deeds in the proper county.

2. Liability of individual members. That the members of any such partnership association shall not be liable under any judgment, decree or order which shall be obtained against any such association, or for any debt or engagement of such company, further or otherwise than is hereinafter provided; that is to say, if any execution, sequestration or other process in the nature of execution, either at law or in equity, shall have been issued against the property or effects of the company, and if there cannot be found sufficient thereof whereon to levy or enforce such execution, sequestration or other process, then such execution, sequestration or other process may be issued against any of the members to the extent of the portions of their subscriptions respectively, in the capital of the association not then paid up; provided always, that no such execution shall issue against any member, except upon an order of court or of a judge of the court in which the action, suit or other proceeding shall have been brought or instituted; and the said court or judge may compel the production of the books of the association, showing the names of the members thereof, and the amount of capital remaining to be paid

1—Approved March 12, 1880, P. L. 1880, p. 304, c. 204; G. S., p. 2440.

upon their respective subscriptions, and from them, or other sources of information, ascertain the truth in regard thereto, and may order execution to issue accordingly; and the said association shall be and it is hereby required to keep a subscription list book for that purpose, and the same shall be open to inspection by the creditors and members of the association at all reasonable times.

3. The word "limited" to be the last word in name of associations.

That the word "limited" shall be the last word of the name of every partnership association formed under the provisions of this act; and every such association shall paint or affix, and shall keep painted or affixed, its name on the outside of every office or place in which the business of the association is carried on, in a conspicuous position, in letters easily legible, and shall have its full name mentioned in legible characters in all notices, advertisements and other official publications of such association, and in all bills of exchange, promissory notes, checks, orders for money, bills of lading, invoices, receipts, letters and other writings used in the transaction of the business of the partnership association; provided, that the omission of the word "limited" in the use of the name of the partnership association shall render each and every person participant in such omission, or knowingly acquiescing therein, liable for any indebtedness, damage or liability arising therefrom.

4. Interests in association deemed personal estate, and how transferred.

That interests in said association shall be personal estate, and may be transferred under such rules and regulations as the association may prescribe, but no transferee of any interest, or the representatives of any decedent, or of any insolvent, shall be entitled thereafter to any participation in the subsequent business of said association, unless he or she be elected thereto by a vote of the majority of the members in number and value of their interests; and any change of ownership, whether by sale, death, bankruptcy or otherwise, which shall not be followed by election to the association, shall entitle the owner only to his interest in the association at a price and upon terms to be mutually agreed upon, and in default of such agreement the price and terms shall be fixed by an appraiser appointed by the court of common pleas of the proper county, subject to the approval of said court.

5. Meetings of members of association and election of managers. That there shall be at least one meeting of the members of the association in each year, at one of which there shall be elected not less than three or more than five managers of said association, one of whom shall be the chairman, one the treasurer and one the secretary, or one may be both treasurer and secretary, who shall hold their respective offices for one year and until their successors are duly installed; and no debt shall be contracted, or liability incurred for said association, except by one or more of the said managers, and no liability for an amount exceeding five hundred dollars, except against the person incurring it, shall bind the said association, unless reduced to writing and signed by at least two managers.

6. How profits of business divided. That the association may, from time to time, divide the profits of its business in such manner and in such an amount as a majority of its managers may determine, which profits so divided shall not at the time diminish or impair the capital of the said association, and any one consenting to a dividend which shall diminish or impair the capital, shall be liable to any person or persons interested or injured thereby to the amount of such diminution or impairment.

7. Unlawful to loan its credit, name or capital to any member. That it shall not be lawful for such association to loan its credit, its name or its capital to any member of said association, and for such loan to

any other person or association, the consent in writing of a majority in number and value of interest shall be requisite.

8. How association may be dissolved. That such association may be dissolved:

I. Whenever the period fixed for the duration of the association expires;

II. Whenever by a vote of a majority in number and value of interest it shall be so determined; and notice of such winding up shall be given by publication in two newspapers published in the proper city or county at least six consecutive times, and immediately upon the commencement of said advertising, said association shall cease to carry on its business, except so far as may be required for the beneficial winding up thereof.

9. Association may sue and be sued. That said association shall sue and be sued in their association name; and when suit is brought against any such association, service thereof shall be made upon the chairman, secretary or treasurer thereof, which service shall be as complete and effective as if made upon each and every member of such association.

10. Association may adopt and use common seal. That whenever any association formed under the act to which this is a supplement shall have occasion to execute any deed of conveyance, or bonds with or without coupons, and mortgages, to secure, purchase or borrow moneys, such associations shall have a right to adopt and use a common seal, and to acknowledge such instruments or writings by their chairman and secretary.

A SUPPLEMENT TO AN ACT ENTITLED "AN ACT AUTHORIZING THE FORMATION OF PARTNERSHIP ASSOCIATIONS IN WHICH THE CAPITAL SUBSCRIBED SHALL ONLY BE RESPONSIBLE FOR THE DEBTS OF THE ASSOCIATIONS, EXCEPT UNDER CERTAIN CIRCUMSTANCES," APPROVED MARCH TWELFTH, ONE THOUSAND EIGHT HUNDRED AND EIGHTY.¹

1. Association empowered to hold real estate. That any partnership association, formed or to be formed under the act to which this is a supplement, shall have power to purchase and hold real estate and dispose of the same in fee-simple, or for a less estate, the title thereof to be in the name adopted by such association, and shall be as valid and effectual in law or equity as if the same were held in the individual names of the partners of said association, and every deed or conveyance of the same and every mortgage for purchase or borrowed moneys, shall be made in the name adopted by said association, and executed in the same manner as set forth in section ten of the act to which this is a supplement.

2. Title to real estate held by associations. That any association heretofore formed under the act to which this is a supplement, now holding any real estate in their association name, either by purchase or subscription, the title thereof shall be as good and effectual in law or equity as if the same were acquired after the passage of this act.

3. Time when act takes effect. That this act shall be considered as a public act and shall take effect immediately.

¹—Approved March 23, 1883, P. L. 1883, p. 188, c. 141; G. S., p. 2442.

6. POWER COMPANIES.

AN ACT TO AUTHORIZE THE ORGANIZATION OF CORPORATIONS TO CONSTRUCT DAMS IN THE RIVERS AND STREAMS WITHIN THIS STATE, OR BETWEEN THIS AND ANY OTHER STATE, FOR THE PURPOSE OF GENERATING, DISTRIBUTING AND SELLING WATER POWER AND ELECTRIC POWER.¹

1. Articles of association; general powers. Any number of persons not less than three may form a company to construct a dam or dams in any of the rivers or streams within this state, or between this and any other state, for the purpose of generating, distributing and selling water power and electric power; and for that purpose such persons may make and sign articles of association in which shall be stated the name of the company, the number of years the same is to continue, the river or stream, and, as nearly as practicable, the place or places in such river or stream where a dam or dams is or are to be constructed, the total amount of the capital stock of the company, which shall be not less than two thousand dollars, the amount with which the company will commence business, which shall not be less than one thousand dollars, the number of shares of which said capital stock shall consist, the par value of each share, the names and residences of the incorporators, the number of shares subscribed for by each incorporator, the date on which the corporation shall begin, and the period, if any, limited for its continuance; said articles of association shall be proved or acknowledged as required for deeds of real estate and recorded in a book to be kept for that purpose in the office of the clerk of the county in which said dam or dams or any portion thereof may be, and, after being so recorded, shall be filed in the office of the secretary of state, who shall endorse thereon the day they are filed and record the same in a book provided by him for that purpose; said articles of association, or a copy thereof duly certified by the secretary of state, shall be evidence in all courts and places, and upon making said articles of association and causing the same to be filed and recorded as aforesaid the persons so associated, their successors and assigns, shall from the date when the same shall be filed in the office of the secretary of state, be a body corporate by the name specified in such articles of association; every corporation formed under this act, in addition to the general powers set forth in an act entitled "An act concerning corporations" (Revision of one thousand eight hundred and ninety-six), approved on the twenty-first day of April, in the year one thousand eight hundred and ninety-six, and the several acts supplementary thereto and amendatory thereof, shall have the powers in this act hereinafter expressed.

2. Special powers. All companies that may be hereafter established by virtue of this act, for the purpose of damming rivers and streams in this state, or between this and any other state, shall have power to construct, erect and maintain dams on rivers and streams, at such points on said rivers and streams, and at such heights as may be by them deemed necessary or advisable, and the right to flow back and raise the water in such rivers or streams, above such dam, to a height not exceeding ten feet above common low water of such rivers and streams; provided, that such dams on all navigable rivers shall each have a good and sufficient chute in connection therewith, of not less than one hundred feet in width, to enable rafts and flat boats to pass safely and conveniently down the same; and also provided, that said dams shall each be constructed

1—Approved May 18, 1897, P. L. 1897, p. 384, c. 195.

with a fishway for the passage of shad and other fish, which said fishways shall be constructed and maintained under the supervision and approval of all the fish commissioners of this state; and also provided, that the plans and construction of such dams shall be approved by at least three engineers and experts, to be appointed by the governor of this state on the application of such companies; they shall receive such compensation for their services, to be paid by the applying company, as shall be fixed by said governor, and any company failing to comply with the provisions of this section shall thereby forfeit the franchises given it by this act.

3. Further powers. Such companies shall have power to cut or acquire main canals or raceways on each side of said rivers or streams from their said dams to such point or points below as may by them be deemed necessary, and also to cut, construct and erect as many lateral or branch raceways, locks, weirs, gates and other works, from their said main canals or raceways to the said rivers or streams, as may by them be deemed expedient for the purposes of creating, generating, using and selling the power of the said rivers and streams, and electric power developed from said water power for mills, manufactories, foundries, machine shops and other purposes; provided, that the water so diverted from such rivers and streams shall be returned again to them after being used for the purpose aforesaid as unpolluted as before it was used; and further provided, that such companies shall commence their proposed dams and works within two years from the date of their organization, and complete their said dams and cut or acquire their main canals or raceways within three years from the date of commencement as aforesaid, and any company failing to comply with the provisions of this section shall thereby forfeit the franchises given it by this act.

4. Additional powers. Such companies shall have power from time to time to purchase, receive and hold, possess and enjoy, demise, grant, lease, alien, sell and convey all such lands, lots, sites, mills, manufactories, erections, hereditaments, water power and electric power developed from water power, rights, goods, chattels or effects, or any part thereof, for such term or terms, and upon such condition or conditions, as they shall from time to time deem necessary or expedient for the public purposes of this act; and also to construct, make, erect, form and maintain all such embankments, reservoirs, aqueducts, culverts, locks, weirs, gates, ways, bridges and other works as may by them be deemed convenient and necessary for the uses and purposes aforesaid, and to repair and improve the same for the better carrying-on and management thereof; and further, that it shall and may be lawful for such companies, by their directors, officers, agents, engineers, superintendents or contractors, or any other person or persons by them employed, from time to time and at all times hereafter, to enter upon all lands, whether covered with water or not, for the purposes contemplated by this act, doing no unnecessary damage; and when the locations of their said dams, and the routes and locations of their main canals and raceways, branches and improvements shall be determined by the directors of such companies, or a majority of them, from time to time, and a survey thereof, together with the lands and portions of such rivers or streams necessary for the same, shall, by an engineer or other person employed by such company, be completed and deposited in the office of the secretary of state, then it shall be lawful for the said companies, their agents, engineers, contractors, superintendents or other person or persons employed by them, to enter upon, take possession of, and use, occupy and possess, all and singular, such lands and premises, subject to such compensation, and in such manner as provided in the fifth section of this act.

5. How property acquired.¹ Where any waters, streams, lands, property, materials or franchises, that may be necessary or useful for the said dams, on rivers and streams, or for the said canals or raceways, shall not be made a free gift by their owner or owners to such companies for the public purposes thereof, then such companies shall pay to the owner or owners of all such lands such compensation as shall be mutually agreed upon between them; and if any such corporation or its agents cannot agree with the owner or owners of any such waters, streams, lands, property, materials or franchises, for the compensation proper for the damage done or likely to be done to or sustained by any such owner or owners of such waters, streams, lands or materials which such corporation may enter upon, use or take away, in pursuance of the authority herein given, or by reason of the absence or legal incapacity of any such owner or owners, no such compensation can be agreed upon, a particular description of the waters, streams, lands, materials, franchises or other property so required for the use of such company incorporated under this act, in the construction of said dams, canals, raceways and other works, shall be given in writing, under oath or affirmation of some engineer or proper agent of the company, and also the name or names of the occupant or occupants, if any there be, and of the owner or owners, if known, and their residence, if the same can be ascertained, to one of the justices of the supreme court of this state, who shall cause said company to give notice thereof to the persons interested, if known and in this this state, or if unknown and out of this state, to make publication thereof as he shall direct, for any term not less than ten days, and to assign a particular time and place for the appointment of the commissioners hereinafter named, at which time and place, upon satisfactory evidence to him of the service or publication of such notice aforesaid, he shall appoint, under his hand and seal, three disinterested, impartial and judicious freeholders, residents in the county in which the waters, streams, lands, materials or other property in controversy lie or the owners reside, commissioners to examine and appraise said waters, lands or other property, and to assess the damages, upon such notice to be given to the persons interested as shall be directed by the justice making such appointment, to be expressed therein, not less than ten days; and it shall be the duty of said commissioners (having first taken and subscribed an oath or affirmation before some person duly authorized to administer an oath, faithfully and impartially to examine the matter in question, and to make a true report according to the best of their skill and understanding) to meet at the time and place appointed, and to proceed to view and examine the said waters, streams, lands, materials or other property, and to make a just and equitable estimate or appraisement of the value of the same, and an assessment of damages to be paid by the said company for such waters, streams, lands, materials or other property, and damages aforesaid, which said report shall be made in writing, under the hands and seals of the said commissioners, or any two of them, and filed within ten days thereafter, together with the aforesaid description of the waters, streams, lands, materials or other property, and the appointment and oaths or affirmations aforesaid, in the clerk's office of the county in which the said waters, streams, lands, materials or other property are situate, to remain of record therein; and thereupon and on payment or tender of payment of the amount awarded as hereinafter provided, the said company is hereby empowered to enter upon and take possession of the said waters, streams, as hereinbefore mentioned, lands, materials or other property, for the purposes aforesaid; and the said report, or a copy thereof, certified by the clerk of said county, and proof

1—See Eminent Domain Act, p. 648, below.

of payment or tender of the amount awarded, shall at all times be considered as plenary evidence of the right of any such company to have, hold, use, occupy, possess and enjoy the said waters, lands or other property, or the said owner or owners to recover the amount of said valuation, with interest and costs in an action on contract in any court of competent jurisdiction, in a suit to be instituted against the said company, if they neglect or refuse to pay for twenty days after demand made of their treasurer, and shall from time to time constitute a lien upon the property of said company in the nature of a mortgage; and the said justice of the supreme court shall, upon application of either party, and on reasonable notice to the others, tax and allow such costs, fees and expenses to the commissioners, clerks and other persons performing any of the duties prescribed in this section as he shall think equitable and right, which shall be paid by the said company; provided always, that should any such company or the owner or owners of any such waters, streams, lands, materials or other property feel aggrieved by the decision of the commissioners aforesaid, he, she or they may appeal to the next circuit court in the county wherein the said waters, streams, lands, materials or other property may be.

6. Appeal from decision of commissioners. Every appeal from the decision of the commissioners appointed under the preceding section shall be made in writing, and in the form of a petition to said court, and filed with the clerk of the said circuit court of the county wherein such waters, streams, lands, materials or other property appraised by the said commissioners shall be, and notice in writing of such appeal shall be given to the opposite party within ten days after the filing thereof, which proceeding shall vest in the said circuit court full right and power to hear and adjudge the same, and to direct a proper issue for the trial of said controversy to be formed between the said parties, and to order a jury to be struck and a view of the premises to be had, and the said issue to be tried at the next term of said court to be holden in the said county, upon the like notice and in the same manner as other issues in the said court are tried; and it shall be the duty of the said jury to assess the value of the said waters, streams, lands, materials or other property, and damages sustained, and if they shall find a greater sum than the said commissioners shall have awarded in favor of the said owner or owners, then judgment thereon, with costs, shall be entered against any such company and execution awarded therefor, but if the said jury shall be applied for by the owner or owners and shall find a less sum than such company shall have offered, or the said commissioners shall have awarded, then said costs shall be paid by said applicant or applicants and either deducted out of said sum found by said jury, or execution awarded therefor, as the said court shall direct; but such application shall not prevent such company from taking the said waters, streams, lands, materials or other property, upon filing the aforesaid report of the said commissioners; provided, that in no case whatever shall such company enter upon or take possession of any waters, streams, lands, materials or other property of any person or persons for the purpose of actually constructing said dams, reservoirs, canals, raceways and other works, or making any erections or improvements whatever, or otherwise appropriating said waters, streams, lands, materials or other property to the use of any such company, until they have paid or tendered to the party or parties entitled to receive the same the amount assessed by the said commissioners as the value of such waters, streams, lands, materials or other property or damages; but in case the party or parties entitled to receive the amount assessed as aforesaid by the said commissioners shall refuse, upon tender thereof being made, to receive the same, or shall be out of the state or under any legal disability, then the payment of the amount

assessed as aforesaid into the circuit court of the county wherein the said waters, streams, lands, materials or other property lie, shall be deemed a valid and legal payment; and further provided, that the party or parties entitled to receive the amount assessed by said commissioners may, upon tender thereof being made, accept and receive the same without being barred thereby from his, her or their appeal from the report of the said commissioners; that on such tender or payment of the money into court, in case it be refused as aforesaid, such company shall be empowered to enter upon and take possession of said waters, streams, lands, materials, or other property, and proceed with the work of constructing the said dams, canals, raceways and other erections and improvements.

7. Rights of others not impaired. Nothing in this act shall be construed to impair the rights of any corporation, person or persons to an action against such company, their agents, workmen, servants or contractors, for any damage done to his, her or their land, hereditaments and premises by the erection or construction of said dams, canals, raceways, reservoirs and improvements, where such corporation, person or persons have not been agreed with by such companies, or his, her or their damages paid and satisfied by such companies, under the provisions of this act.

8. May issue bonds. Every such company may make and issue bonds, with or without coupons attached, bearing interest not exceeding six per centum per annum, to borrow money or to secure any indebtedness created by them, and sell, exchange or otherwise dispose of the same, upon such terms and conditions as they may deem advisable, and such bonds, and the interest thereon, may be secured by a mortgage or mortgages, given or executed to a trustee or trustees for the use of the bondholders, upon the corporate franchises, real and personal estate, and all other property of said companies, or any part thereof; provided, they shall not issue bonds for a greater sum than double the amount of their capital stock paid in.

9. Merger and consolidation. It shall be lawful for any company incorporated under this act, at any time during the continuance of its charter, to lease its dams and works, or any part thereof, to any other corporation or corporations of this or any other state, or to unite and consolidate, as well as merge its stock, property, franchises, dams and works with those of any other company or companies of this or any other state, to form a new corporation, or to do both, and such other company and companies are hereby authorized to take such lease, or to unite, consolidate, as well as merge its stock, property, franchises, dams and works with said company, to form a new corporation, or to do both, and after such lease or consolidation the company or companies so acquiring said stock, property, franchises, dams and works may use and operate such dams and works and their own dams and works, or all or any of them, according to the provisions and restrictions contained in this act, notwithstanding any special privilege heretofore granted to another corporation.

10. May develop electric power and sell. Every corporation organized under this act may develop electric power for commercial purposes by means of water power, and shall have authority to supply current and power to individuals, firms and corporations at such prices as may be agreed upon, and shall have authority to make, erect and maintain the necessary buildings, machinery and apparatus for developing power and current, and to distribute the same to any place or places with the right to enter upon any public road, street, lane, alley or highway for such purposes, and to erect posts or poles on the same to sustain the necessary wires and fixtures, and to alter, inspect and repair its system of distribution; provided, that no such company shall enter upon any street or alley

in any city, borough or township in this state, until after the consent to such entry of the council or other governing body of the city or borough, or the township committee of the township in which such street or alley may be located, shall have been obtained.

11. Not to supply water for domestic use. No company organized under this act shall acquire under any of its provisions the power to supply any municipality or any part of the public with water for potable or other domestic uses; nor shall any of the provisions of this act be construed to in anywise impair the right or privilege of any municipality to take from the rivers and streams within this state, or between this and any other state, the potable waters thereof for public purposes, nor shall such company be entitled to damages or compensation for the diversion of any of the waters of such river or stream or tributaries thereof for the water-supply of any municipality in this state.

A SUPPLEMENT TO AN ACT ENTITLED "AN ACT TO AUTHORIZE THE ORGANIZATION OF CORPORATIONS TO CONSTRUCT DAMS IN THE RIVERS AND STREAMS WITHIN THE STATE, OR BETWEEN THIS AND ANY OTHER STATE, FOR THE PURPOSE OF GENERATING, DISTRIBUTING AND SELLING WATER POWER AND ELECTRIC POWER," APPROVED MAY EIGHTEENTH, ONE THOUSAND EIGHT HUNDRED AND NINETY-SEVEN.¹

1. Annual report of receipts and dividends. Every corporation organized under the provisions of the act to which this act is a supplement, shall, on or before the first Tuesday of May, annually, make return to the state board of assessors of the gross amount of its receipts for light or power supplied within this state for the year preceding the first day of February prior to the making of such report, and the amount of dividends declared or paid during the same time.

2. License fee. Each corporation organized under the act aforesaid shall pay to the state an annual license fee or franchise tax at the rate of one-half of one per centum upon the amount of its gross receipts so returned, or as ascertained by the state board of assessors, and five per centum upon the dividends in excess of four per centum declared or paid by said corporation, and the state board of assessors shall assess the said franchise tax in the manner and form prescribed by an act entitled "An act to provide for the imposition of state taxes upon certain corporations and for the collection thereof," approved April eighteenth, one thousand eight hundred and eighty-four, and its various supplements and amendments.

3. Repealer. All acts and parts of acts inconsistent herewith are hereby repealed and this act shall take effect immediately.

AN ACT TO AUTHORIZE CORPORATIONS, ORGANIZED FOR THE PURPOSE OF CONSTRUCTING A DAM OR DAMS IN ANY RIVER OR STREAM TRIBUTARY TO BARNEGAT BAY FOR THE PURPOSE OF DEVELOPING AND SELLING WATER POWER AND GENERATING, DISTRIBUTING AND SELLING ELECTRICITY, TO CONDEMN OR TAKE PROPERTY FOR A PUBLIC USE.²

1. Surveys for dams, reservoirs, etc. Every corporation heretofore or hereafter organized for the purpose of constructing a dam or dams in any river or stream tributary to Barnegat bay for the purpose of de-

1—Approved March 30, 1898, P. L. 1898, p. 192, c. 117.

2—Approved April 19, 1906, P. L. 1906, p. 237, c. 127.

veloping and selling water power and generating, distributing and selling electricity, shall have power to cause examinations and surveys to be made for its proposed dam or dams, reservoirs, ponds, locks, weirs, gates, bridges, races, canals, power stations, as well as the land that may be overflowed by the erection of such dam or dams; and for such purposes by its officers, agents or servants to enter from time to time upon any lands or waters for the purpose of making such examinations or surveys, subject to liability for all damage done, and when the location of such dam or dams, reservoirs, ponds, locks, weirs, gates, bridges, races, canals, power stations, as well as the land that may be overflowed by the erection of such dam or dams, shall from time to time be determined by the directors of such corporation, or a majority of them, such corporation shall cause a survey and map to be made of the land to be taken or entered upon, which map shall be signed by the president and secretary, and filed in the office of the county clerk of the county in which the lands shown on such map are situated.

2. Right of condemnation. Where any such corporation cannot acquire the real or personal property, rights, privileges, franchises or easements needed for such dam or dams, reservoirs, ponds, locks, weirs, gates, bridges, races, canals, power stations and flowage, by agreement with the owners thereof, whether by reason of disagreement as to price or the legal incapacity or absence of the owner, or his inability to convey valid title, or of the owner or owners being unknown, or by reason of any other cause, it shall be lawful for such corporation to condemn and take such real estate or personal property, rights, privileges, franchises or easements necessary for such dam or dams, reservoirs, ponds, locks, weirs, gates, bridges, races, canals, power stations and flowage, and the compensation to be paid therefor shall be ascertained and paid, in the manner provided by an act entitled "An act to regulate the ascertainment and payment of compensation for property condemned or taken for public use" (Revision of 1900), approved March twentieth, nineteen hundred, and the acts amendatory thereof and supplemental thereto.

3. Repealer. This act shall take effect immediately, and all acts and parts of acts inconsistent herewith are hereby repealed.

7. RAILROAD COMPANIES.

AN ACT CONCERNING RAILROADS (REVISION OF 1903).¹

I.

FORMATION AND POWERS.

1. Proceedings for formation of railroad company. Any number of persons, not less than seven, may form a company for the purpose of constructing, maintaining and operating a railroad for public use in the conveyance of persons and property, by executing and filing pursuant to the provisions of this act a certificate of incorporation, which shall be signed in person by all the subscribers to the capital stock named therein, who from the date of such filing as herein provided, shall be and constitute a body corporate; the said certificate shall set forth:

I. The name of the company, which shall not resemble any name already in use by any corporation of this state, so as to lead to uncertainty or confusion;

¹—Approved April 14, 1903, P. L. 1903, p. 645, c. 257.

II. The location of the principal office in the state;

III. The object of the company, the terminal points of the proposed railroad, the counties of this state in or through which it and its branches are intended to be constructed and the length of such road and of each of its branches as near as may be;

IV. The amount of the total authorized capital stock which shall be not less than ten thousand dollars per mile; the number of shares into which the same is divided and the par value of each share; the amount of capital stock subscribed by the incorporators with which it will commence business, which shall not be less than two thousand dollars for each mile or fraction thereof; and if there be more than one class of stock created by the certificate a description of the different classes with the terms on which created;

V. The names and places of residence of the incorporators and the number of shares subscribed by each; the aggregate of such subscription shall be the amount of capital with which the company shall commence business;

VI. The names and places of residence of the first directors of the company, not less than seven nor more than seventeen in number, who shall be stockholders and incorporators of the company and at least one of whom shall be a resident of this state and who shall manage its affairs until others are chosen in their places at the next annual election;

VII. The period, if any, limited for the duration of the company;

VIII. Any provision authorized by this act or by law which the incorporators may choose to insert for the regulation of the business and for the conduct of the affairs of the corporation; or for creating, defining, limiting and regulating the powers of its directors or stockholders;

The certificate shall be proved or acknowledged as required for deeds of real estate and shall be filed in the office of the secretary of state upon compliance with the terms of this act.

2. Amount to be deposited with state treasurer; certified copy certificate evidence of incorporation. The certificate of incorporation shall be filed in the office of the secretary of state until there shall have been annexed thereto and filed therewith an affidavit, made by at least five of the directors in the certificate named, that at least two thousand dollars of stock for each mile or fraction thereof designated in the certificate, has been in good faith subscribed and paid in cash, and that it is intended in good faith to construct, maintain and operate the road mentioned in the certificate; nor shall the certificate be filed in said office until at least two thousand dollars of stock for each mile or fraction thereof, of railroad designated in the certificate to be constructed, has been paid in cash to the directors, and deposited by them with the treasurer of the state, who shall hold the same subject to be repaid to the company, or its treasurer, in sums of two thousand dollars for each mile of said railroad, upon the construction of which it shall be proved to his satisfaction that the company has expended at least two thousand dollars; the secretary of state shall record the certificate, when duly filed, in a book to be provided by him for the purpose, and said certificate or a copy thereof, or of the record thereof duly certified by the secretary of state, shall be evidence of the incorporation of the company and of the facts therein stated.

3. General powers. Every railroad company shall have the general powers conferred by the act entitled "An act concerning corporations" (Revision of 1896), and the supplements thereto, and shall be governed by the provisions and be subject to the restrictions and liabilities in said act contained, so far as the same are appropriate to and not inconsistent with this act or with the provisions of the act under which any such

company may have been created and organized, and, in addition thereto, shall have power:

I. Determine route and enter upon lands. To locate and determine its route and works, and for that purpose to make such surveys for its proposed railroad as may be necessary to the selection of the most advantageous route, and to enter upon lands or waters of any person, doing no unnecessary injury to private or other property, and subject to responsibility for all damages which shall be done thereto;

II. Acquire real estate. To acquire from time to time, and hold and use all such real estate and other property as may in the judgment of its directors be necessary for terminal purposes, and for the construction and maintenance of its railroad, and stations, branches, sidings, car yards, engine-houses, repair shops and other accommodations necessary to accomplish the objects of its incorporation, and to sell land thus acquired when not necessary for such purposes and objects.

III. Construct and operate road. To construct and operate its road, to construct or purchase all engines, cars, machinery and appliances for the transportation of persons and property, to charge and collect fares and charges for transportation of passengers and freight and to exercise all other powers by this act granted.

4. Directors; officers and agents. The directors of every railroad company shall be stockholders and shall be not less than seven or more than seventeen in number; the first directors shall be those specified as such in the certificate of organization, and thereafter directors shall be chosen at the annual meetings of the stockholders; the directors shall appoint one of their number president, and shall also appoint a treasurer, secretary and chief engineer, and such other officers and agents as shall be necessary, and shall fix their salaries or compensation; the directors may add to their number by selecting from the body of stockholders from time to time an additional member or members to be and act as vice-president or additional vice-presidents, with such powers and duties and compensation as the corporation or directors may determine, provided that the number of directors shall not thereby be made more than twenty; one director shall be an actual resident of this state, but it shall not be necessary for the president or more than one director to be such resident thereof, notwithstanding the provisions of any special charter or other act; in case the whole capital stock has not been subscribed, the directors may receive subscriptions for shares, but no subscription shall be taken without the payment by the subscriber of at least ten per centum of the amount subscribed in cash.

5. Change of name and capital stock; preferred stock; bondholders right to vote. Every railroad company shall have power to change its name, to decrease or increase its capital stock, and to create one or more classes of preferred stock, by certificate and proceedings in the manner prescribed by the twenty-seventh, twenty-eighth and twenty-ninth sections of the "Act concerning corporations" (Revision of 1896); the stockholders of any railroad company may, by agreement expressed in the certificate of incorporation, or in a supplementary certificate executed and acknowledged by every stockholder, and filed in like manner as the original certificate, authorize and empower the holders of bonds of the company secured by mortgage on its property and franchises, to vote at meetings of stockholders, in person or by proxy, either for the election of directors or for other purposes, each bondholder to cast as many votes as if the holder of stock of par value to the principal of his bonds, and the production of his bonds shall be evidence of his right to vote, and every bondholder so voting shall be subject, to the extent of the amount of his bonds, to the same liabilities as stockholders.

6. Borrow on bond and mortgage. Every railroad company shall have power to borrow such sums of money from time to time, not to exceed in the whole its paid-up capital stock, as shall be necessary to construct, improve, extend or repair its road and furnish all necessary lands, chattels, engines, cars and equipments, and for such purpose to issue and sell its bonds secured by mortgage on its railroad, lands, chattels, franchises and appurtenances, and such company shall not plead any statute against usury in any suit at law or in equity to enforce the payment of any bond or mortgage executed under the provisions of this section; in the case of any railroad company in this state the amount of whose mortgage debt shall have been limited by special law, the written consent of the holders of at least two-thirds in value of all its stock shall be obtained before any such mortgage shall be executed; any person who shall issue bonds of any railroad company to an amount greater than the amount authorized by this or any other act shall be guilty of a misdemeanor. Where a mortgage on a railroad right of way and franchises includes chattels, it shall be sufficient notice and evidence thereof to record the same as a mortgage on real estate.

II.

RIGHT OF WAY.

7. Width; survey filed; branches. The right of way of any railroad, or of any branch thereof, shall not exceed one hundred feet in width unless more land shall be required for the slopes of cuts or embankments, or for retaining walls, in which case such land may be acquired as part of such right of way; it shall be lawful for any railroad company, its incorporators and agents, to enter at all times upon all lands or waters for the purpose of exploring, surveying and laying out the route or routes of its railroad, and of locating the same, and to locate all necessary works, buildings, conveniences and appurtenances, doing no unnecessary injury to property, and when the route of the railroad shall have been determined upon, a survey of such route and location, particularly describing the same, shall be filed in the office of the secretary of state; the company may also, from time to time, after the filing of the survey of the route of the main line and either before or after construction thereon, file surveys of the route and location of branches within the limits of any counties in or through which the main line may be located and of any county adjoining such counties.

8. Connecting roads. Whenever the railroads of any railroad companies shall intersect or cross or shall approach each other within a distance of one mile, either company may construct and operate a branch to effect a connection of such railroads, and may take and hold the land and property necessary for that purpose, on filing a map and description of the survey of the route of such branch, in the office of the secretary of state; and making the required deposit with the state treasurer; the connection shall be made upon such terms as may be agreed by the companies operating such roads, and in case of failure to agree, either party may apply to the supreme court, whose duty it shall be to appoint three disinterested citizens of the state who shall determine and fix the terms, which, when approved by the court, shall be conclusive and such companies shall be required to carry into effect.

9. May purchase or construct branches. Any railroad company may lay out and construct, or may acquire, lease or purchase any branch line or lines of railroad not exceeding two miles in length, and may maintain and operate the same, extending from the main line or from any branch

line of said company to any mill, factory, miné, clay bed or ware-house, whenever, in the judgment of the board of directors, it shall be for the interest of the company, and may take and hold the land necessary for that purpose on filing a map and description of the survey of the route of such branch in the office of the secretary of state, and making the required deposit, pending construction, with the state treasurer; provided, that no company shall construct any such branch within the limits of any city or town until it shall first obtain the consent of the municipal authorities thereto.

10. Survey of branches and deposit. The survey of the route of any branch shall not be filed in the office of the secretary of state until the company shall have deposited with the state treasurer a sum equal to at least two thousand dollars for every mile, and a proportionate sum for any distance less than a mile of the length of such branch, and the state treasurer shall be the custodian of said fund and shall hold the same, subject to be repaid to the directors or the treasurer of said company in installments of two thousand dollars for each mile, and a proportionate sum for any distance less than a mile of such branch, upon the construction of which it shall be proved, to his satisfaction, that such amount has been expended; it shall be the duty of the secretary of state to record at length in a proper book to be by him provided, at the expense of the state, all descriptions of the surveys of the main lines or branches filed with him, for which he shall collect from the company filing the same the fees prescribed by law for recording deeds, and such record or a certified copy thereof shall be evidence of such survey and location; any survey of a route heretofore filed with the secretary of state may be recorded, and a copy of the record shall be evidence in like manner.

11. Abandonment of part of line. Whenever any railroad company may deem it expedient to abandon a part of its line before the same shall have been wholly completed, and shall file and record in the office of the secretary of state a certificate of abandonment, executed by its president and secretary, under its seal, describing the portion of the route of the proposed railroad to be abandoned, it shall be the duty of the treasurer of the state to repay to the company out of the money of said company therefor deposited with the treasurer, as required by law, a sum equal to two thousand dollars for every mile, and a proportionate sum for any distance less than a mile of its route so abandoned and said corporation shall not thereafter extend, build or construct its railroad upon the portion so abandoned, without first filing and recording a new survey thereof in the office of the secretary of state and making the deposit with the treasurer, required by law.

12. Re-locating route. Any portion of the location of the route of any railroad company may be relocated by the board of directors before construction and after the filing of the original survey, by filing and recording an amended survey thereof in the same manner as the original survey; the directors of any railroad company owning or operating any railroad in this state, may change the location of a part of its route for any section not exceeding one mile in length, by filing and recording a survey of the new location and of the section abandoned with the secretary of state, where, in the judgment of the directors, such change is necessary to avoid any quicksand, quagmire or sink-hole, or other physical obstacle in the way of the safe and convenient construction, maintenance or operation of the railroad; provided, that such alterations shall not be made in any city after the road has been actually constructed within its limits; any railroad company may straighten, shorten or improve the route of its railroad or connect points thereon by shorter lines or branches, and may take and acquire by condemnation all such lands as shall be necessary in the judgment of the directors for that purpose, and

also all such lands as shall be necessary as aforesaid for the erection of freight and passenger stations and all the legitimate purposes of such company upon such straightened, shortened or improved line by filing and recording a survey thereof in the same manner as is required in the case of an original survey of location; provided, that no more than one hundred feet in width for the main track of any road shall be taken from the right of way except where necessary for the slopes or cuts or embankments or for retaining walls; the company may retain and continue to use or may sell or otherwise dispose of the whole or any part of the original road, for which such line has been substituted, after it has constructed its road on its new location.

13. Condemnation; appeal from award; may not condemn other roads. Any railroad company may, either at the time of its organization or construction or thereafter, as occasion may require, take by condemnation any of the land and property required for the right of way of its main line and branches, not exceeding one hundred feet in width unless more shall be required for slopes of cuts or embankments or retaining walls, and all such other land and property adjoining to such right of way, as in the judgment of the directors the exigencies of business may demand, for the erection of freight and passenger depots, and all other legitimate purposes of the company, upon ascertainment and payment or tender of compensation as prescribed by law; and either party may have an appeal from the award of commissioners fixing compensation, and the proceedings on such ascertainment, taking and appeal shall be had pursuant to "An act to regulate the ascertainment and payment of compensation for property condemned or taken for public use" (Revision of 1900); no company organized under this act shall be authorized to take, use or occupy, by condemnation, any franchise, lands or located route of any railroad or other corporation chartered for the purpose of facilitating transportation except for the purpose of crossing said land or route and except the land of such corporation not necessary for the purposes of its franchise; and no railroad under this act shall cross another railroad at grade at a less angle than twenty degrees; provided, that a railroad may be located under this act upon the surveyed route or location of any other railroad company, with the consent of such company; no company shall be authorized to take by condemnation any land belonging to the state of New Jersey.

III.

CONSTRUCTION AND EQUIPMENT.

14. Must begin construction. The company shall commence its proposed railroad within six months from the date of its organization, and shall open and complete at least one track within two years from the date of commencement, where the road shall be fifty miles or less in length, and where it exceeds fifty miles shall have an additional six months to complete the road for each twenty miles more than fifty in length; provided, that such company shall open fifty miles for public use as soon as fifty miles of track are laid; any company formed under this act and failing to comply with the provisions of this section shall forfeit thereby the franchises given to it by this act; provided, that if such company shall be restrained or prevented by the order of any court or judge, or by any proceedings at law, or in equity, from prosecuting the work on its road, or from opening or completing its road, the time during which such company shall be so restrained or prevented shall not be computed as any part of the time limited in this section for the opening and completion of said road or any part thereof; where any company has failed to construct its railroad upon any part of the location shown by

its filed survey within the time allowed by law, and since the expiration of said time any other railroad company has duly filed a survey of a location crossing or occupying the same, said company last filing its location shall have priority of right over said location.

15. When construction may be made. When the route shall have been duly adopted and survey thereof filed, it shall be lawful for every railroad company, upon payment or tender of compensation by its officers and agents, to construct, maintain and operate a railroad with one or more tracks and with such sidetracks, turnouts, offices and depots as they may deem necessary between the points named in its charter or certificate of incorporation, commencing at or within and extending to or into any town, city or village named as a terminus of such road; and from time to time, either before or after completion of the main line, to construct, maintain and operate branches upon the route or routes described in its filed survey or surveys, and for these purposes, to enter upon, take possession of, hold, have, use, occupy and excavate any lands, and to erect embankments, bridges and all other necessary works, and to do all other things which may be suitable or necessary for the completion, repair or management of said railroad, and for the conveyance of passengers and freight thereon by steam, electric or other motive power; provided, that the payment or tender of all damages for the occupancy of any land, through, under or upon which said railroad and its branches, conveniences and appurtenances may be laid out or located, be made before said company or its agents shall enter upon or break ground, except for the purpose of surveying and locating said railroad and branches, unless the consent of the owner of said land be had and obtained.

16. Bridges, viaducts, tunnels. Any railroad company may build and maintain over such streams as the road may cross, such piers and bridges as they may deem expedient, and may build viaducts over or tunnels under any navigable or other river, stream or bay of water which such railroad may cross; putting in such viaduct a pivot-draw with two openings, each of no less width than the widest opening of any viaduct or bridge now built over any such river, stream or bay of water, at right angles to the main channel, located at a point convenient for navigation; provided, that such company shall not take any land under water belonging to this state until the consent of the riparian commissioners shall first be had and obtained (unless the said land is at least twenty-five feet under the bed of the water), who are hereby authorized to convey the same on receiving such compensation as they may fix.

17. Draws; signals and attendants. Such company shall, at all times, when such river, stream or bay is navigable, for the safety of persons navigating the same, cause to be kept a red light at each outer side of said draws and a white light at each inner side of said draws, which shall be lighted every evening at or before sunset and be kept lighted until daylight, and shall also keep a suitable person or suitable persons at each bridge to open the draws for the free passage of all vessels with standing masts or pipes; and for each and every neglect to keep such light and open the draws when necessary, the company shall forfeit and pay one hundred dollars, to be recovered with costs in any court having jurisdiction thereof, by any person who shall sue for the same within six months after the time of such neglect.

18. Bridge over shallow tidal waters; modifications. When any railroad is constructed across a stream where the tide ebbs and flows, and by reason of the narrowness of the stream or shallowness of the water it is unnecessary or impracticable to put in a pivot-draw with two openings or any draw, the company may apply to the riparian commissioners, who shall, after personal inspection and due inquiry, determine what character of bridge is proper, and whether any draw-bridge is necessary,

and if so, the character and dimensions thereof, and how the same shall be kept and maintained considering the extent and importance both of the navigation of the stream and of the public travel over the railroad, which determination, signed by a majority of the board, shall be filed by them with the clerk of the county or counties in which said bridge lies, and shall bind the company; and a compliance with such determination by the company shall be a full performance of its duties and obligations with respect to such bridge.

19. Ferries. Where the terminus of a railroad company may be on the shore of any river or navigable water of this state, such company may establish and operate ferries for the transportation of persons and property on or across the same, subject to the rates of fare and tolls provided in this act on railroads, and may buy or build vessels and boats and do all things necessary or convenient to carry on such ferry, or may contract with other ferry companies for the transportation of the passengers and freight of such railroad company.

20. Purchase and operate boats and piers. Any railroad company, whenever a majority of the directors thereof shall so decide, may purchase or hire any boats, vessels or barges, and any wharves, piers, docks, landings and buildings situated at or near any terminus of its road, capable of being of use in the transportation of freight or passengers, and any company is hereby empowered to make such sale or lease whenever a majority of the directors shall so decide.

21. Fences and cattle-guards. Every company organized under this act shall erect and maintain fences on the sides of its road of the height and strength of division fences required by law, with gates or bar-ways at farm-crossings; and shall also construct and maintain cattle-guards at road-crossings sufficient to prevent cattle and animals from getting on the railroad; until such fences and guards shall be made, the company shall be liable for damages done by their trains to cattle, horses or other animals straying thereon; and where such fences and guards have been duly made and maintained, the company shall not be liable for such damages unless negligently or wilfully done, any person who shall ride, lead or drive any horse or other animal upon such railroad and within such fences and guards elsewhere than at farm-crossings, without the consent of the company, shall, for every such offense, forfeit the sum of ten dollars and pay all damages sustained thereby to the company, to be recovered in an action of tort.

22. Fence guards and gates in cities; speed regulations. Any railroad company may erect a fence or other enclosure around its stations so as to prevent persons other than passengers from coming near its trains, and may exclude from such enclosures all persons except travelers; where any railroad company in any city shall maintain along its roadway where the same may adjoin a public highway, a fence or embankment four feet high, sufficiently close and strong to prevent children and horses from going through the same, or where its track shall be laid in a cut at least four feet deep, and shall provide on each side of the track at any highway-crossing in such city a gate of like height and sufficiency, and cause the same to be closed at least half a minute before any train may cross such highway and until such train shall have passed by, in such case it shall be lawful for such company to run its trains in said city over the portions of its railroad thus protected and over the portions not adjoining or crossing any highway, at such rate of speed as it deems proper, but in the absence of such protection and safeguard, the company shall be bound by lawful and reasonable municipal ordinances regulating the speed of its trains along streets and at crossings.

23. Construction of tunnels under streets, rivers, etc., restrictions and regulations. It shall be lawful for any corporation heretofore or here-

after organized under this act, whose route lies in part under the bed of the waters of an interstate river, or under the bed of other interstate waters, to build its railroad under the same by tunnel, and in approaching such rivers or waters, to build its railroad in part by tunnel under lands and longitudinally or otherwise under streets and public places in cities or municipalities and under railroads and rivers, and in part on or above the surface of the land, and enter upon, purchase or acquire in the manner provided by law, such lands or rights or easements in lands along its said route, upon, over or beneath the surface of the land as shall be necessary for its purposes, and it shall have power to construct, erect and secure the foundations and other structures which may be required for the construction, maintenance and operation of such road, and may connect such road under the bed of the waters of such interstate river with the railroad of any company now or hereafter organized under the laws of an adjoining state; whenever such corporation shall construct a tunnel, such tunnel shall be so built and at all times kept in such condition as to make the surface of the ground above the same firm and safe for building and other erections thereon; whenever it shall be necessary, in constructing such railroad, to alter the position of any public sewer or water pipe, the same shall be done at the expense of said corporation, under the direction of the public authorities having charge thereof; such tunnels shall be at such depths beneath the lands, rivers, railroads, streets and public places as not to interfere with the use thereof, and the right of way beneath the streets and public places, and the use thereof for the purpose of said railroad, shall be considered, and is hereby declared to be a public use consistent with and one of the uses for which the same are publicly held; any such corporation is hereby allowed ten years from the date of its organization to open and complete one track of its road; nothing in this section contained shall be construed as authorizing the building of any railroad either upon or above the surface or by open cut longitudinally along any street of any city or town.

24. Motive power. Any railroad company authorized to use steam as a motive power, may use any motive power which it may deem best adapted to the economical operation of its railroad, and may erect, construct, and maintain and use such machinery, engines, devices and appliances and such poles, wires, conduits, or other methods for conducting and distributing power as may be required, and for this purpose may take lands by condemnation.

25. Cost of road filed with comptroller. As soon as any railroad is in operation, the president of said company shall file in the office of the comptroller of this state a statement, under oath, of the cost of said railroad, including the right of way, road-bed, equipment, appendages and all expenses.

IV.

ROAD CROSSINGS—CONSTRUCTION AND PROTECTION.

26. Street or road crossings. It shall be the duty of every railroad company owning, leasing or controlling any right of way for a railroad within this state, to construct and keep in repair good and sufficient bridges and passages over, under and across the railroad or right of way where any public or other road, street or avenue now or hereafter laid, shall cross the same, so that public travel on the said road shall not be impeded thereby, and said bridges and passages shall be of such width and character as shall be suitable to the locality in which the same are situated; and also where said railroad shall intersect any farm or

land of any individual, to provide and keep in repair suitable and convenient wagon-ways over, under and across said railroad, and to construct and maintain suitable and proper cattle-guards at all road crossings; provided, that this section shall not enlarge the duty imposed by its charter upon any railroad company incorporated by special act and whose railroad was constructed before the second day of April, eighteen hundred and seventy-three.

27. Grade through cities and towns. Where any railroad shall cross any street or highway in any city or town it shall be either above or below the grade thereof, at such distance as shall not interfere with the free and uninterrupted use of such street or highway, unless the common council or other governing body of the city (or town, incorporated as such) in charge of the streets, shall grant permission to the railroad company to cross such street or highway at grade. Provided, that such permission shall not be necessary for the purpose of crossing at grade any street or highway which at the time of the acquirement of the right of way is not in use for pedestrians or wagons, either at the point or crossing or at some other point between the crossing the nearest terminus of such street or highway; where a railroad is constructed above the grade of any street or highway by a bridge, it shall be lawful for the company to erect piers for the support and safety of the bridge, which piers may be located at the outer edge of the wagonway, so as not to encroach thereon, and may extend thence into the sidewalk, or place left therefor; provided, that from the land on each side of said street or highway, so much shall be added to the sidewalk on that side and thrown open to public use for such purpose, as shall be occupied by the pier on that side. (As amended by P. L. 1906, p. 663, c. 301.)

28. Highways may be under or over railroad. When the track of a railroad constructed by a railroad company shall cross a highway or turnpike, such highway or turnpike may be carried under or over the track, as may be found expedient, and in cases where an embankment or cutting shall make a change in the line or route of such highway or turnpike desirable, with a view to a more easy ascent or descent, or where more land shall be required in order to make an embankment or cutting in the highway in its approaches to the crossing to adapt it to the grade thereof, the company may acquire, by purchase or by condemnation in the same manner as lands are taken for the right of way of the railroad company, such additional land for the construction of such highway or turnpike crossing on such new line or route or elevation as may be deemed requisite by the directors, and such land, when so acquired, shall become a part of such intersecting highway or turnpike in such manner and by such terms as the adjacent parts of the same highway or turnpike are held for highway purposes.

29. Proper bridges and crossings. When any company shall not properly construct and maintain the bridges or other crossings of highways by its railroad tracks as required by law, it shall be lawful for the governing body of the township or municipality wherein such crossings are located, within a reasonable time, after notice to the company, to construct or repair such bridges or other crossings, and the cost thereof may be collected from the company, whose duty it is to make such construction or repair, by action in any court of competent jurisdiction; or in lieu of such construction or repair the township or municipality may proceed by suit in equity to compel the specific performance of the duties imposed by law upon such company with respect to the construction, maintenance and repair of such bridges and crossings, and the court shall prescribe the crossing to be constructed or the repairs to be made; and in order to enforce obedience to its decree or mandate, the court may

restrain the exercise of any of the franchises of the company or adopt such other remedies as may be in accordance with the practice of the court.

30. Alteration of street grades. In any municipality or township it shall be lawful for the proper municipal authorities to enter into such contracts with any railroad company whose road may lie wholly or partially within the municipality or township or whose route has been located therein as will secure greater safety to persons or property therein or will facilitate the construction therein or maintenance of other than grade crossings of streets, highways or other railroads, and for that purpose the municipal or township authorities may open, vacate or alter the lines and change the grade of any street or highway, and the railroad company may locate, re-locate, change, alter grades of, depress or elevate any of its railroad tracks as in the judgment of the municipal authorities or railroad company respectively may be best adapted to effectuate the purposes aforesaid; nothing herein shall repeal or in anywise affect an act entitled "An act to authorize any town or city of this state to enter into contracts with railroad companies," etc., approved March twentieth, one thousand nine hundred and one, and the amendment thereof, approved April third, one thousand nine hundred and two.

31. County road crossings. Where any public road maintained at county expense is intersected by a steam railroad, it shall be lawful for the board of chosen freeholders of the county, by a vote of three-fourths of the board, and for the company owning or operating such railroad, to enter into a contract to provide for such grades or changes in the grades of such county road and railroad as shall be necessary to pass such county road over or under the railroad tracks, and the board may change the grade of the county road according to such contract, and may appropriate and order to be raised by taxation and pay such sums as shall be necessary to carry out the contract; it shall be lawful for any company owning or operating a street railroad on such county road at the crossing to become a party to such contract.

32. Cross steam roads by trolley lines. When the tracks on the line of any railroad company authorized to use steam as a motive power, shall be crossed by the route of any other railroad or of any street or electric railroad hereafter to be constructed at a point not within the limits of any city, such crossing shall be made in such a way as will inflict the least injury upon the rights of the company owning or operating the railroad crossed, and as will afford proper protection to the public; and no company shall construct any railroad or any street or electric railroad across the line of any steam railroad at any point not within the limits of the city, except by agreement with the company whose line is crossed, as to the mode of crossing; where no such agreement shall be made or where the crossing is in a highway, no such crossing shall be constructed until the company seeking such crossing shall have first made application to the chancellor to define the mode in which such crossing shall be made; and it shall thereupon be the duty of the chancellor, after causing reasonable notice to be given to the township or municipal authorities and also to the corporation owning or operating the railroad to be crossed, to define, by his decree, the mode in which such crossing shall be made, and if, in his judgment, it shall be reasonably practicable to avoid a grade crossing, and public safety so requires, he shall, by his decree, define and regulate the mode and manner of crossing, otherwise than at grade, and the changes necessary in the grade of any highway to adapt it to such crossing, which shall thereupon be made as directed by such decree and in no other way.

33. Procedure to alter grades. When the construction of a crossing in the mode directed by decree of the chancellor shall require a change of

the grade of a highway so that the same may pass above or under the tracks of the steam railroad, or the taking of additional land for the highway, the company so crossing shall have power to alter such grade, and the grade of any other connecting street so far as necessary to conform thereto, in the mode directed by the decree, and to take such land for the highway as may be necessary; and the company making such crossing shall pay the damages occasioned by the change of grade, and shall pay the value of the land taken and damages for change of grade; and the procedure for the ascertainment of such damages or value and damages, or both, shall be generally as prescribed by the "Act to regulate the ascertainment and payment of compensation for property condemned or taken for public use" (Revision of 1900), except that the chancellor shall perform the duties in said act devolved upon the justice of the supreme court, and the commissioners shall present their report to the chancellor, who may, after hearing, confirm the same or refer it back for correction and confirm it as corrected, or may, in his discretion, direct the issue to be tried by the circuit court and a jury; and the proceedings shall be conducted under the direction of the chancellor; and when such report or verdict shall be confirmed by the chancellor, and a copy of the record thereof recorded in the office of the county clerk or register, it shall be final and conclusive, and on payment or tender and payment into the court of chancery, made as prescribed in said act or as directed by the chancellor, the company may proceed in the construction of said crossing.

34. Road through cities may be elevated. In any city, except a city of the first class, the municipal authorities may permit any railroad company to land and construct its tracks along and upon any street or highway, or above such street or highway by means of an elevated structure, and may contract with such railroad company, fixing terms and conditions as to maintenance of crossing, speed of trains and payment of consideration for such use, and may do all things necessary to carry out such contracts, and any such contract heretofore made is hereby ratified and confirmed; provided, that no such railroad shall be constructed along or above any such street or highway until the company shall have acquired the right of the owners abutting thereon by agreement or condemnation proceedings. (As amended by P. L. 1905, p. 130, c. 68.)

35. Engine bell; whistle; grade crossing signs. A bell of a weight not less than thirty pounds shall be placed on each engine and rung continuously in approaching a grade crossing of a highway, beginning at a distance of at least three hundred yards from the crossing and continuing until the engine has crossed such highway, or a steam whistle, shall be attached to each engine and be sounded, except in cities, at least three hundred yards from the crossing and at intervals until the engine shall have crossed the highway, under penalty of twenty dollars for each default, to be paid by the company operating such road, to be sued for by any informer within ten days after such penalty was incurred, one-half thereof to go to the informer and one-half to the county; provided, that nothing herein shall take away any remedy for such neglect from any person injured thereby; every railroad company shall cause a conspicuous sign, with the inscription on each side: "Look out for the locomotive," to be maintained at each highway crossing at grade of its railroad, so as to be easily seen by travelers, but such signs need not be maintained in any city, town, borough or village unless required by the municipal authorities.

36. Court of chancery may order gates or flagman. Whenever the governing body of any township or municipality shall, by ordinance, so direct, an application shall be made on behalf of said township or municipality to the court of chancery by petition for an order that gates

shall be erected across any one or more streets or highways where the same are crossed by a railroad track at grade, or that a flagman shall be stationed there to give notice of the approach of trains, or that some other reasonable provision for protecting such crossing shall be adopted; and upon filing such petition the chancellor shall, after such notice to the railroad company operating said railroad as he may deem necessary, proceed in a summary way in person or by reference to a vice-chancellor or master to investigate the circumstances of the case, and if the court shall decide that protection of the crossing is reasonable and necessary, the court shall make an order or decree that gates or bars shall be erected and maintained or a flagman stationed by such railroad company at such crossings or any of them, or that some reasonable provision for protecting the crossing to be specified in said order or decree shall be made by said railroad company; the railroad company shall protect the crossing as so directed, and may be compelled so to do by mandatory injunction and other appropriate remedy, and such order or decree shall be subject to review on appeal; in the case of highways hereafter laid out, crossing at grade railroads constructed at the time of opening of such crossing, the court shall, on such application, determine what portion, if any, of the expense of establishing gates and maintaining the same, or of maintaining flagmen, should be borne by the township or municipality, and may make such order for the payment as may be necessary; nothing in this section shall repeal or limit the other powers conferred upon any township or municipality to protect or regulate grade crossings.

V.

CARRIAGE OF PASSENGERS.

37. Train service. Every railroad company shall start and run trains for the transportation of passengers and property at regular times to be fixed by public notice, and shall furnish sufficient accommodations for the transportation of all such passengers and property as shall within a reasonable time previous thereto be offered for transportation at the place of starting and the junctions of other railroads and at usual stopping places established for receiving way passengers and freight for that train, and shall take, transport and discharge such passengers and property at and from and to such places, on the due payment of the fare or freight legally authorized therefor, and shall be liable to the party aggrieved in an action for damages for any neglect or refusal in the premises; if any passenger shall fail or refuse to pay his fare it shall be lawful for the conductor of the train and the servants of the corporation to put him and his baggage out of the cars, using no unnecessary force, at any usual stopping place or near any dwelling house, but not on any bridge or in any dangerous place.

38. Passenger rates, parlor and sleeping car charges. Any railroad company may demand and receive such sums of money for the transportation of persons on its railroad and connections, and for any other services connected with the business of transportation of persons on or over said railroad or to or from the same, as it shall from time to time think reasonable and proper, not exceeding in the case of railroad companies organized under this act, three cents per mile for carrying each passenger on such railroad, and not exceeding in the case of railroads constructed or operated under a special charter, three and a half cents per mile for carrying each passenger on such railroad, and not exceeding the rate per mile limited by the charter, but no charge shall be required to be less than ten cents; tickets for passengers, except excursion

tickets or tickets sold at reduced rates shall be good until used; tickets sold at less than the rates herein limited shall be good and shall entitle the holder to passage for a limited number of days only after the date of issue thereof, which limit shall be clearly stated and set upon the ticket; any railroad company owning or operating a railroad may collect an excess of ten cents over the established rate of fare from any passenger who pays his fare on the train, giving him a receipt therefor, which shall entitle the holder to have such excess refunded upon presentation at any ticket office of the company on the line of its railroad; such extra fare as the company may deem expedient may be collected from passengers who travel in cars furnished in a superior manner and with extra accommodations for the comfort of passengers, commonly known as parlor or sleeping cars, provided said company shall also run trains of ordinary first-class passenger cars in numbers sufficient to accommodate fully all persons who prefer to travel therein.

39. When road not liable for passenger's injury. In case any passenger on any railroad shall be injured by reason of his going or remaining on the platform of a car or on any baggage, wood or freight car, in violation of the printed regulations of the company posted up in a conspicuous place inside of its passenger cars on the train, such company shall not be liable for the injury; provided said company at the time furnished seats inside its passenger cars sufficient for the proper accommodation of its passengers.

40. State officials entitled to free transportation. The Governor, Chancellor, Vice-Chancellors, the Justices of the Supreme Court and the Judges of the Court of Errors and Appeals, Judges of the Circuit Court, Attorney-General, Secretary of State, State Treasurer, Deputy State Treasurer, State Comptroller, Deputy State Comptroller, Clerk in Chancery, Deputy Clerk in Chancery, Clerk of the Supreme Court, Deputy Clerk of the Supreme Court, Adjutant-General, Quartermaster-General, the Secretary to the Governor, the Executive Clerk, Clerk to the School Fund, State Librarian, Custodian and Assistant Custodian of the State Capitol, State Prison Keeper, Supervisor of the State Prison, the Superintendent of the New Jersey Reformatory, State Superintendent of Public Schools, the members of the Board of the Fish and Game Commissioners, its Secretary and Protectors, Assistant State Superintendent of Public Schools, Commissioner of Banking and Insurance, Commissioner of Charities and Corrections, State Geologist, Commissioner of Public Roads, State Supervisor of Public Roads, Commissioner of Motor Vehicles, Chief of the Bureau of Labor and Statistics, Deputy Chief of the Bureau of Labor and Statistics, Commissioner of Labor, Assistant Commissioner of Labor, the members and clerk of the State Board of Equalization of Taxes, the members and secretaries of the State Board of Assessors and the Board of Railroad Commissioners, its secretary and inspectors, the members of the State Water Supply Commission, its secretary and engineer, the members of the Public Utilities Commission, its secretary and inspectors, members of the Civil Service Commission, and the secretary and chief examiner thereof, Commissioner of Inland Waterways, Chief of the Bureau of Shell Fisheries, the secretary and members of the State Board of Health, the members of the Riparian Commissions and the secretary and engineer thereof, the members and officers of both Houses of the Legislature of this State and the members of Congress and United States Senators, during their various respective terms of office shall pass and repass free of charge on all railroads now or hereafter operated in this state. (As amended by P. L. 1910, p. 151, c. 100.)

41. Baggage to be checked. A check shall be affixed to every parcel of baggage taken for transportation by any railroad company, if there is a

handle, loop or fixture so that a check can be attached on such parcel, and a duplicate check shall be given to the passenger or to the person delivering the same on his behalf, and if such check be refused on demand, the company shall pay to such passenger the sum of ten dollars, to be recovered in a civil action, and no fare or toll shall be collected from such passenger, and if he shall have paid his fare, the same shall be refunded by the conductor in charge of the train.

42. Transportation of bicycles. Any person who shall have purchased a ticket issued by any railroad company entitling him to transportation on its railroad or ferries as a passenger, shall have the right by virtue thereof and in lieu of other baggage to the transportation (on the same train or boat with such passenger) as baggage, of one bicycle to and from the place designated in such ticket without further or other payment to the railroad company therefor; which transportation shall be on the same train or boat with such passenger, where facilities for the transportation of baggage then exist on such train or boat; provided that such passenger shall remove any lantern from such bicycle; and no passenger shall be required to remove any ordinary or usual bicycle bell or cyclometer from such bicycle, nor to crate, cover or otherwise protect it; provided that no railroad company transporting bicycles as baggage in accordance with this act shall be liable for any damage done to any bell, cyclometer or like attachments; any railroad company refusing to accept for transportation or to transport bicycles as baggage, in violation of this section, shall forfeit and pay to such passenger ten dollars for each offense, to be recovered in an action on contract in any court of competent jurisdiction.

VI.

CARRIAGE OF FREIGHT.

43. Freight charges. Any railroad company may demand and receive such sums of money for the transportation of property on its railroad and connections and for any other services connected with said transportation on or over its railroads or to or from the same as it may from time to time think reasonable and proper, not exceeding ten cents per mile per ton for property of any description, subject, however, as follows: no charge shall be required to be in the aggregate less than three cents per hundred pounds for stone, coal, lime, sand, shells, ashes, iron ore, pig-iron and firewood and five cents per hundred pounds for other freight; on any small package twelve cents may be charged whatever may be its weight or the distance, but not where six or more small packages are delivered to one person at one time, and can be readily weighed in the aggregate either as light or bulky goods or as ordinary freight, in which case the charge shall not exceed that allowed for five small packages unless the lawful charge by weight for all such six or more small packages shall exceed the said amount authorized by law for five small packages, in which case the charge shall be by weight; and when such bundles and small packages shall be delivered to one person at one time with other ordinary freight, the whole shall be aggregated, weighed and charged for as ordinary freight where such charge exceeds that authorized for five small packages; on light and bulky goods eighty cubic feet may be estimated as a ton.

44. Way freight charges; exchange of freight. No company shall charge or receive any greater rate of compensation for transportation of property between way stations or between a terminal station and a way station than for transportation of such property between terminal stations; all companies whose railroads cross, intersect or join shall de-

liver to and receive from each other and forward to their destination all property intended for points on their respective roads with the same dispatch and at a rate of freight not exceeding the local tariff rate charged to other persons on similar property received at and forwarded from the same point.

45. Carriage of mails. Any railroad company shall, when applied to by the postmaster-general, convey the mails of the United States on its railroad, and if such company shall not agree as to the rate, time, speed, manner and terms of carrying the same, it shall be lawful for the governor of this state to appoint three commissioners who, or any two of whom, after a hearing on fifteen days' notice in writing of the time and place of such hearing to the company, shall fix the price and terms, which price shall not be less for carrying said mails in the regular passenger trains than the amount which such company would receive as freight on a like weight of merchandise transported in their merchandise trains, and a fair compensation for the postoffice car; and in case the postmaster-general shall require the mail to be carried at other hours or at a higher speed than the passenger trains are run, the company shall furnish an extra train for the mail, and be allowed an extra compensation for the expenses of the service, to be fixed as aforesaid.

46. Express matter. Any railroad company may charge for the transportation of express matter in packages weighing less than one hundred pounds each, or the value of which exceeds one dollar per pound, or of property forwarded in passenger or special trains or of property the handling or transportation of which is attended with extraordinary expense or risk, such as living animals in less quantities than carloads, valuable furniture not boxed, powder, glass-plates, pianos and the like, any rate not exceeding twice the rate such company is allowed to charge for the transportation of ordinary goods by their respective charters or the law of the state; any railroad company may receive from any express or transportation company, person or firm any amount that such company, person or firm shall agree to pay for carrying express goods or other property, any limit to the rate of compensation in the charters of such railroad companies or otherwise to the contrary notwithstanding; nothing in this act shall be so construed as to exonerate any railroad company from carrying goods other than hereinbefore mentioned that shall be offered to their agents for transportation on the terms prescribed by their respective charters or by the laws of the state.

47. Delivery of freight; demurrage. When any freight has been carried on the railroad and delivered by the company at any point specified by the consignor, other than a station of the company, the company shall not, after such delivery, be responsible for the safety and security thereof. Where the consignee of property transported by railroad to any point in this state cannot be found, or refuses to receive and pay charges and remove such property, the company may make and collect a reasonable charge not exceeding one dollar per day, for the detention of any railroad car containing such property, or for the use of the railroad track, occupied by such car or for both such detention and use; provided, no railroad company shall be entitled to impose, demand or collect any charge for delay in unloading goods from any railroad car, or for any detention of such car, commonly called demurrage or car service, until after the expiration of three whole days, at least, exclusive of Sundays, from the time such car has been placed in proper position for unloading, and has, except removal for convenience of railroad operation, not exceeding one working hour daily, so remained; and provided further, that notice is given to the consignee or owner or to the shipper in cases where the consignee or owner cannot be found on whom to serve such notice, and to add such charge to the charge for the transportation

of such property. Such company shall have a lien upon such property, or so much thereof as has not been taken, for the charges for such detention and use; provided, that in all cases where a claim made by any railroad company for detention of any car, or for demurrage, or car service charges is disputed, the consignee or owner or the agent of either shall, on the giving to said railroad company of a bond with sufficient surety, in double the amount of such disputed charge (in no case, however, to be less than fifty dollars), conditioned for the payment of such sum as shall be found to be due, by agreement of the parties, or by judgment of any court in any suit for the same, with costs, be entitled to delivery of the goods transported in the car for the detention of which such demurrage charge is claimed free from any lien or claim for such charge; and, by memorandum of agreement signed by both principal and surety, any such bond may be extended or continued to cover other disputed demurrage charges claimed thereafter. (As amended by P. L. 1907, p. 648, c. 256.)

48. Limit of responsibility. Any railroad company may, by giving notice to any person offering goods, merchandise or baggage for transportation on the railroad or in the vessels of the company, limit their responsibility as carriers thereof to one hundred dollars for every one hundred pounds' weight, unless such person shall pay to the company by way of insurance, for any additional amount of responsibility to be assumed, such rate as may be charged by said company therefor, not to exceed the legal rates for transporting one hundred pounds for every two hundred dollars of additional responsibility assumed on each one hundred pounds, and at that rate for a greater or less quantity; and a general notice of the limitation of the company's liability, placed in a conspicuous place at or in the office of the company where goods, merchandise or baggage is usually received for transportation, and inserted in the bill of lading or receipt given for such goods or merchandise, and in the tickets delivered to passengers, shall be deemed sufficient notice under this section.

49. Carriage of explosives. No person shall be entitled to carry or require any company to carry on any railroad any aqua fortis, oil of vitriol, gunpowder, nitro-glycerine, matches, or other goods of a dangerous nature, and if any person sends by the railway any such goods without distinctly marking their nature on the outside of the package containing the same, or otherwise giving notice in writing to the agent of the company with whom the same are left at the time of so sending, he shall forfeit to the company twenty dollars for every such offense, and be besides liable to all damages that may occur therefrom, and the company may refuse to take any parcel that they may suspect to contain goods of a dangerous nature or may require the same to be opened to ascertain the fact.

VII.

REGULATIONS, REMEDIES AND PENALTIES.

50. Passenger train men to wear badges. Every conductor, brakeman, engineer, baggagemaster, or other servant of any railroad company employed on a passenger train or at a station for passengers, shall wear upon his hat or cap a badge, which shall indicate his office and the initial letters of the style of the company by which he is employed; no conductor or collector without such badge shall be entitled to demand or receive from any passenger any fare or ticket, or to exercise any of the powers of his office, and no officer or servant without such badge shall have

authority to meddle or interfere with any passenger, his baggage or property; if any person shall, while in charge of an engine running upon a track of any railroad company, or while acting as conductor of a car or train, be intoxicated, he shall be guilty of a misdemeanor.

51. Sale of books, papers, etc., on train. When any person not authorized by a license signed by the president or superintendent, shall get upon a train of any railroad company with intent and purpose to sell books, papers, fruit, provisions or other articles, it shall be lawful for any conductor or other servant or agent of the company to eject such person from the train and station of the company, using no unnecessary violence, and to take possession of such books, papers, fruit, provisions and other articles, and the baskets, boxes or vessels containing the same, and to give them to the overseer of the poor of the township or municipality where such person shall be ejected, for the use of the poor.

52. Making up trains. In forming a passenger train, no freight car shall be placed in the rear of a passenger car, and if it shall be so placed the conductor, officer or agent who so directed or knowingly suffered such arrangement, shall be guilty of a misdemeanor; no cars engaged in the transportation of petroleum or crude oil in bulk, shall pass any passenger train in any tunnel or on any bridge more than one hundred feet in length, nor enter into such tunnel or upon such bridge during the time a passenger train shall be there, under the penalty of one thousand dollars for each violation hereof, to be recovered from the company by any inhabitant of this state who may sue for the same, one-fourth of said sum to go to the plaintiff and three-fourths to the school fund of the state.

53. Signal device between engine and cars. Any company operating a railroad shall have a bell, gong or whistle on the locomotive, to which a rope or strong cord shall be attached, leading from thence through every baggage, express and passenger car, and through or over every other car in the train, and within easy and convenient reach of the employees on the train, and the other end attached to the rear end of the rear car of said train; or in lieu thereof on its passenger trains or mixed passenger and freight trains, such company shall adopt and use any apparatus, device or machine, approved by the general manager or general superintendent of the company, and using air, steam or electricity, whereby signals may be surely, quickly and conveniently given to the engineer upon the engine drawing the train, by employees in any car of the train; any company violating the provisions of this section shall be subject to a fine of five hundred dollars for each offense, to be recovered by any inhabitant of this state who may sue for the same in any court having cognizance of the same, one-fifth of said fine to go to the plaintiff and four-fifths to the state.

54. Unobstructed windows. It shall not be lawful to use in the transportation of passengers on any railroad any passenger car having fastened screens, bars or gratings across the windows, and any person or company violating this act shall forfeit two hundred dollars for each offense, to be recovered by any inhabitant of this state who may sue for the same in any court having cognizance of the same, one-quarter to go to the plaintiff and three-quarters to the state.

55. Trespassing on tracks. It shall not be lawful for any person other than those connected with or employed upon the railroad to walk along the tracks of any railroad except when the same shall be laid upon a public highway; if any person shall be injured by an engine or car while walking, standing or playing on any railroad, or by jumping on or off a car while in motion, such person shall be deemed to have contributed to the injury sustained, and shall not recover therefor any damages from

the company owning or operating said railroad; provided, that this section shall not apply to the crossing of a railroad by any person at any lawful public or private crossing.

56. Spark arresters. Every company or person operating or using any railroad shall take and use all practicable means to prevent the communication of fire from any engine used by them in passing along or being upon such railroad to the property, of whatever description, of any owner or occupant of any land adjacent or near to said railroad, and shall provide such engine with a screen or cover in the smokestack so as to arrest and prevent, as much as practicable, the escape of fire; any company or person refusing or neglecting to make such provision shall forfeit for every such refusal or neglect one hundred dollars to any person who may sue for the same, to be recovered, with costs, in an action upon contract in any court having cognizance thereof, one-half of the sum to go to the person suing and one-half to the state for the public-school fund.

57. Liability for damages from sparks. When injury is done to property by fire communicated from an engine of any company or person in violation of the foregoing section, such company or person shall be liable in damages to the person injured; and in every action for an injury done to the property of any person by fire communicated from an engine in violation of the preceding section of this act, proof that the injury was communicated from an engine shall be prima facie evidence of such violation, subject, nevertheless, to be rebutted by evidence of the taking and using all practicable means to prevent such communication of fire as by said section required; it shall be lawful for any railroad company to insure such property exposed to loss by fire communicated from its engines, and such company shall have an insurable interest therein.

58. Period for bringing suit for damages. All actions accruing from injuries to persons caused by the wrongful act, neglect or default of any railroad company owning or operating any railroad within this state, shall be commenced and sued within two years next after the cause of action accrued, and not after; actions by an executor or administrator for injuries causing the death of the testator or intestate shall be commenced and sued within one year next after the death, and not after; all actions for injury done to any property by fire communicated by an engine of any railroad company on any railroad within this state shall be commenced and sued within one year after the cause of action accrued, and not after.

59. Avoidance of paying fare; who may apprehend. If any person shall travel or attempt to travel on any train on any railroad without having previously paid his fare, and with intent to avoid payment thereof, or if any person having paid his fare for a certain distance shall knowingly and wilfully proceed on such train beyond such distance without previously paying the additional fare for the additional distance, and with intent to avoid the payment thereof, or if any person knowingly and wilfully refuse or neglect on arriving at the point to which he has paid his fare to quit such train, every such person shall for every such offense forfeit to the company running the train a sum not exceeding five dollars, which fine shall be imposed with costs by any justice of the peace in the county, or district court of a city, or any recorder, police justice or police court of the municipality where the offender may be arrested or sued, by whatever name such police court may be known, before whom such person shall be brought, on complaint made on oath or affirmation, and after summary hearing of the facts and circumstances or on admission of the party, and such justices, district courts, recorders, police justices and police courts shall have jurisdiction of

such complaints and proceedings; if any person be discovered in committing or attempting to commit such offense, all officers, servants, railway police and other persons on behalf of the company, and all constables and peace officers may lawfully apprehend and detain such person until he can conveniently be taken before such justice, district court, or such recorder, police justice or police court of the municipality, or until he shall be otherwise discharged by due course of law.

60. Penalty for exercising franchise without authority. Any company or person exercising or attempting to exercise a railroad franchise without statutory authority, shall be liable to a penalty of two hundred and fifty dollars for each and every offense, to be sued for and recovered in the name of the state of New Jersey, one-half of which fines, when recovered, shall be paid to the informer, and the other half into the treasury of the county where the action shall be tried or conviction had; this penalty is not exclusive of any other remedies.

61. Penalties for wrongful acts of employees and others. Any employee of any railroad company who shall wilfully or negligently disregard and disobey any rule, regulation or published order of the company in regard to the running of trains, shall be deemed guilty of a misdemeanor; any person who shall wilfully impair, injure, destroy or obstruct the use of any railroad, or of any tracks, wharves, bridges, cars, engines, machinery, crossing signs, signals, gates or other necessary works of any railroad company, shall forfeit and pay to the company owning or operating such road the sum of fifty dollars, to be recovered in an action on contract in any court of competent jurisdiction; the penalties imposed by this section shall not exclude any other liability, penalty or remedy, civil or criminal.

62. Strikes. If any railroad employee on any railroad within this state engaged in any strike, or with a view to incite others to such strike, or in furtherance of any combination or preconcert with any other person to bring about a strike, shall abandon the engine in his charge when attached to a train at any other place than the schedule or otherwise appointed destination of such train, or shall refuse or neglect to continue to discharge his duty, or to proceed with such train to the place of destination aforesaid; or if any railroad employee within this state, for the purpose of furthering the object of or lending aid to any strike organized or attempted to be maintained on any other railroad, either within or without the state, shall refuse or neglect in the course of his employment to aid in the movement over and upon the tracks of the company employing him of the cars of such other company received therefrom in the course of transit, he shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than one hundred nor more than five hundred dollars, and may also be imprisoned for a term not exceeding six months, at the discretion of the court.

63. Interference by strikers, or destruction of property. If any person in aid or furtherance of the objects of any strike upon any railroad, shall interfere with, molest or obstruct any locomotive engineer or other railroad employee engaged in the discharge or performance of his duty as such, or shall obstruct any railroad track within this state, or shall injure or destroy the rolling stock or other property of any railroad company, or shall take possession of or remove any such property, or shall prevent or attempt to prevent the use thereof by such company or its employees, or shall by offer of recompense induce any employee of any railroad company within this state to leave the service of such company while in transit, every such person offending shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not exceeding five hundred dollars, and may also be imprisoned not more than one year, at the discretion of the court.

VIII.

CONSOLIDATION AND LEASE.

64. May lease or consolidate; agreement to be filed. Any railroad company of this state may lease its road, or any part thereof, to any other railroad company of this or any other state, or may take a lease of the road, or any part thereof, of any other railroad company of this or any other state, or may unite and consolidate as well as merge its stock, property, franchises and road with those of any other company or companies of this or any other state, or may do both, and after such lease or consolidation the company or companies so acquiring said stock, property, franchises and road may use and operate said road and their own road, and collect fares and freights as provided in the case of companies under this act, but not in excess of the charges on the line of any of the consolidated companies, and shall not exceed the rates limited by any special act incorporating such company; such leasing or consolidation may be made where the roads of the said companies connect either directly or over the intervening line of one or more other railroad companies; no such lease, union, consolidation or merger shall take effect until the parties thereto file in the office of the secretary of state an agreement surrendering to the state all rights of exemption and contract privileges with respect to taxation, and reserving to the state any existing right to take the property of any of the parties, and the property and franchises in this state of the lessor and lessee and of such consolidated company shall be subject to taxation under the general laws of this state. (As amended by P. L. 1906, p. 266, c. 141.)

65. When road may merge with road of another state. Nothing in this act contained shall be construed to repeal the act entitled "An act respecting the leasing of railroads," approved May second, eighteen hundred and eighty-five, as amended by act of April second, eighteen hundred and ninety-eight; but any railroad company whose road or proposed road is less than ten miles in length, at any time after its route shall have been determined upon and the survey thereof filed as required by law, may unite, consolidate and merge its capital stock, franchises, property and road with those of any other railroad company now or hereafter organized under the laws of any adjoining state, in the manner provided by law for the consolidation of railroad companies of this state, whenever the railroads of said companies so to be consolidated may together form a continuous line of railroad; any lease shall be made by a contract approved either in writing or by vote at a meeting of stockholders by the holders of two-thirds of all the capital stock of the railroad company of this state party to such contract, and filed with the secretary of state.

66. Procedure. The procedure for the consolidation and merger of railroad franchises and property shall be as follows:

1. The directors of the several companies proposing to consolidate may enter into a joint agreement under seal for the consolidation of said companies and railroads, prescribing the terms and conditions, the mode of carrying the same into effect, the name of the new corporation, which may be that of either of the parties or a new name, the number and names of the directors and other officers thereof, and who shall be the first directors and officers, and their places of residence, the location of the principal office in this state, which shall be at some point on the line of the road, the number of shares of capital stock, of which not more than two-thirds may be preferred stock, the amount or par value of each share, and the manner of converting the capital stock of each company into that of the new company, and how and when directors and

officers shall be chosen, with such other details as they shall deem necessary to perfect such consolidation and new organization;

II. Said agreement shall be submitted to the stockholders of each of said companies at a meeting called for the purpose; notice of the time and place of holding such meeting and of the object thereof shall be mailed to the residence or postoffice address of each stockholder, if known, and such notice shall be published in some newspaper in the city, town or county where such company has its principal office or its principal place of business, at least once a week for at least two weeks, and at said meeting the agreement of the directors shall be considered and a vote by ballot taken for its adoption or rejection, and if two-thirds in value of all the votes cast at such meeting by stockholders voting in person or by proxy, of each of said companies, shall be for the adoption of said agreement, then that fact shall be certified thereon by the secretary of each company under its seal.

67. Agreement filed; status of new company. The agreement of consolidation so adopted, with the certificates of adoption thereon, shall be filed and recorded in the office of the secretary of state, and such record or a certified copy thereof shall be evidence of such agreement and of the existence of said new corporation; and the several parties thereto shall from the time of such recording be taken to be one railroad company of this state by the name adopted, possessing within this state all the rights and franchises and subject to all the restrictions, disabilities and duties of such companies of this state so consolidated; and all the rights, privileges and franchises of each of said companies parties to the same, and all rights of way, property, real and personal, and all debts, stock, subscriptions and other things in action of each of said companies shall be taken to be transferred to such new company without further act or deed, and to be vested in such new company as effectually as they were in the former companies, and all rights of creditors and all liens upon property shall be preserved unimpaired, and all debts, liabilities and duties of either of said consolidated companies shall thenceforth attach to said new company and be enforced against it to the same extent as if incurred by it.

68. Rights of dissatisfied stockholder. Any stockholder of any company who shall refuse to convert his stock into the stock of the consolidated company, or who may dissent from any lease of the property and franchise of his company to another new company, may at any time within thirty days after the adoption of said agreement by the stockholders of his company apply by petition, on reasonable notice to the company, to the chancellor or to the supreme court, or one of the justices thereof, who shall appoint three disinterested citizens of this state to estimate the damage, if any, done to such stockholder by said proposed consolidation, and shall also separately appraise the shares of such stockholder at the full market value thereof without regard to any depreciation or appreciation thereof in consequence of said consolidation, and their award when filed with the clerk in chancery or the clerk of the supreme court and confirmed by the said chancellor, court or justice, shall be final and conclusive; and said company may, at its election, either pay to the stockholder the amount of the damages so found, if any, or the value of the stock so appraised and determined; and upon payment of the value of his stock the same shall be transferred and shall belong to said company, to be disposed of by the directors or retained; and in case the value of the stock shall not be paid within thirty days after the confirmation of the award and notice to said company, the damages so found and confirmed shall have the force and effect of a judgment of the supreme court or a decree of the court of chancery, for said damages, against said company.

69. Exchange of stock; issue of bonds. Any railroad company formed by merger or consolidation of two or more railroad companies under this act may issue shares of capital stock at par of an amount equal to the aggregate par value of all the stock of the consolidated companies and twenty per centum in addition thereto, and may issue preferred stock to an amount not exceeding one-half of its authorized capital, and may exchange its stock, common or preferred, and its bonds for the bonds, mortgages, debts and stock of the companies consolidated on terms agreed upon with the holders thereof and approved as a part of the agreement; or such consolidated company may sell its stock and bonds and use the proceeds to carry out the agreement of consolidation and to extend, repair, improve and equip its railroads, and furnish all necessary lands, chattels, engines, cars and equipments; provided, that nothing in this section shall be construed to reduce or restrict the amount of capital stock authorized to be issued by any company under its charter.

70. New company may borrow money. In all cases of merger or consolidation of the stock, property or franchises of any railroad company of this state with those of any other railroad company of this or of another state, the consolidated company shall have power and authority to borrow any amount of money, notwithstanding any limitation or restriction contained in this or any other act, sufficient to cover all the indebtedness of the companies so merged and consolidated, and to complete, extend, repair, improve and equip its railroad, and furnish all necessary lands, chattels, engines, cars and equipments, and to issue bonds for the money borrowed, secured by mortgage on its corporate property and franchises, or any part thereof; any railroad company which shall be authorized to lease its road to a railroad company of another state by special act sanctioning such lease shall, in addition to its then existing power to borrow money and issue bonds secured by mortgage, have power to borrow money and issue bonds, payable not more than one hundred years from the date thereof, to an amount sufficient to cover all its indebtedness, and for the other purposes in this section above mentioned, and may secure said bonds by mortgage on its property and franchises, and such bonds may be given in exchange for or in satisfaction of bonds or other debts of the company upon such terms as may be agreed on with the holders.

71. Surveys and maps of new company filed. When railroad companies shall have merged their corporate franchises and property as hereinbefore provided, the new company so created shall file and record a survey of its line or lines, and file a map thereof in the office of the secretary of state, and therein may relocate any part of its routes not constructed, and locate new routes on making the required deposit with the state treasurer, and the line or lines described on said survey and map shall be taken to be the line or lines of said railroad company, and all other routes, lines or locations which shall not have been actually built upon shall be deemed and taken to be abandoned; such consolidated company shall have power to take land by purchase or by combination in the same manner and to the same extent as companies organized under this act.

IX.

SALE AND REORGANIZATION.

72. Purchase by another road of road sold by order of court. Whenever the railroad and franchises of any railroad company of this state, or any part thereof, shall be sold by virtue of a decree, order or judgment of any court of competent jurisdiction, any other railroad company of this state owning, leasing or operating a railroad having physical

connection therewith, may purchase the road and franchise sold, either at the official sale or thereafter from the purchaser thereof at said sale, and the railroad and franchises so purchased shall be merged with and become a component part of the railroad company so purchasing the same, upon the filing and recording in the office of the secretary of state a certificate, executed by the president and secretary of the purchasing railroad company, setting forth said purchase, and upon filing and recording a survey of the route and filing a correct and accurate map thereof in the office of the secretary of state; a certified copy of said certificate and survey shall be evidence thereof in all courts and places.

73. Sale by receiver. The receiver appointed by the chancellor of an insolvent railroad company of this state, or of another state holding railroad franchises and property in this state, may, with the approval of the chancellor, lease or sell the railroad of the insolvent company with all its chartered rights, privileges and franchises; and the purchaser or lessee shall hold, use and enjoy the same during the residue of the term limited in the charter of the company or during the term in such lease specified in as full and ample manner as the company could or might have enjoyed the same and subject to all the restrictions, limitations and conditions contained in such charter; in the case of an insolvent railroad company whose railroad lies partly in another state, the chancellor may order the sale of any of its property or franchises, at the same time and place, whether in or out of this state, of any official or foreclosure sale of the property and franchises out of this state, and such sale may be made in such manner that a purchase thereof may be made on one and the same bid by the purchaser of the property and franchises out of this state or otherwise as the chancellor may direct, imposing on the purchaser such terms and conditions as shall be equitable, and the chancellor may order the company to join with the receiver in the conveyance of said property and franchises.

74. Title vested by sale or lease; rights and powers of new company. When any sale shall have been made or shall be made of any railroad in this state under execution or by force of any decree or judgment in foreclosure or insolvency proceedings, or otherwise, or when any lease of any railroad shall be made by a receiver by order of the chancellor, the sale and conveyance or lease duly made shall vest in the purchaser or purchasers, such title of the parties to the suit as the court may direct, and may include all property and franchises of the corporation subject to all conditions, limitations and restrictions, and the purchaser or purchasers and his or their associates or assigns not less than seven, nor more than seventeen in number, or a lessee from the receiver and his associates not less than seven, nor more than seventeen in number, may within eighteen months after such sale or lease organize as a railroad company by filing and recording in the office of the secretary of state a certificate that they accept the charter of the company whose property has been sold or leased under some corporate name different from that of the former company and setting forth also the further particulars required in a certificate of organization under this act so far as applicable, and such company shall have all the powers and franchises, and be subject to all the restrictions, limitations and conditions of the former company, in lieu of such acceptance of the former charter the purchaser or purchasers or lessees may form a railroad company under this act at any time after such sale or lease, and said company shall have power to take conveyance of and operate such railroad with the powers and franchises by this act conferred in lieu of those granted by special charter. (As amended by P. L. 1909, p. 48, c. 32.)

75. New company may issue bonds and settle debts or former company.

When a new railroad company shall be organized to purchase and operate the railroad and franchises of any railroad company of this state, sold on foreclosure or insolvency proceedings, and has acquired title to such railroad and franchises, pursuant to any plan for readjustment of the interest therein of mortgage creditors, other creditors and stockholders, and for the representation of such interest in the bonds, debts or stock of the new company, in such case the new company may issue its bonds and common and preferred stock in conformity with such place or agreement, and may at any time within six months after its organization, compromise, settle or assume the payment of any debt or liability of the former company on such terms as may be approved by a majority of the agents or trustees entrusted with the carrying out of the plan of reorganization.

76. Sale by foreclosure when part of property lies without state.

Where a suit shall be brought to foreclose a mortgage of the franchises and road of any railroad company of another state, any part of whose route, whether acquired by lease or otherwise, shall lie within this state, such suit in this state shall, so far as is consistent with the protection of parties having liens in this state, be conducted as auxiliary to the foreclosure suit in the state where such corporation is domiciled, and the court of chancery shall have power to decree the sale of property and franchises in this state, to be made in such other state at the same time and place as the foreclosure sale therein, under such regulations as to advertisement and otherwise otherwise and on such terms as the chancellor may direct; and no conveyance shall be made until confirmation by the chancellor of the sale, and the chancellor may impose such terms as may be equitable upon the acquisition by the purchase of the property and franchises of the company in the hands of a receiver, if any, in this state.

77. Action to secure portion of road in this state sold under foreclosure elsewhere.

Where a new railroad company shall be formed in the state of the domicile of such former company by the purchasers, or on their behalf, to take and operate said railroad and its franchises, such company may, within six months after such sale, apply to the court of chancery in the foreclosure suit in this state by petition containing a copy of its charter, certificate of incorporation or other documentary legal evidence, and thereupon the chancellor, on due proof, may adjudge and decree that said company has been legally created, and has acquired the railroad property and franchises of the original company, and a copy duly certified of said petition, proceedings and decree shall be filed in the office of the secretary of state, and said record, or a copy thereof, shall be evidence of the incorporation and rights in this state of such new company; and the purchasers at the official sale of the property and franchises of said company may transfer said property and franchises to said company, or, if no conveyance has been made, may assign and set over their bids, in which case the chancellor may direct the receiver, master or officer to make conveyance to such new company on such terms as shall be equitable, and such company shall have and possess all powers of corporations organized under the laws of this state, and all powers conferred by said laws on the corporation whose franchises and property were sold, and may enjoy said property and exercise such franchises so conveyed to it within this state as fully as if it was organized under the laws of this state, and subject to all liens, contracts, limitations, covenants and agreements relative to the mortgaged premises, property and franchises prior to the making of said mortgage; and the filing of said record in the office of the secretary of state shall

operate as a covenant to perform said contracts, limitations, covenants and agreements.

X.

MISCELLANEOUS.

78. Annual report to legislature; filed with comptroller. Every railroad company in this state shall, on the first Tuesday of January in each year, make to the legislature a report, under oath of the president of the company, containing an account of capital stock paid in, the amount of funded and other debts of the company, the cost of the road, the cost of equipment, also of the operation of the company during the year preceding up to the first day of January aforesaid; also the expenditures for working said road, including repairs, maintenance of way, motive power and contingencies; also income from passengers, freight and other sources; also amount of dividends and how paid; also the accidents that have occurred during said year on the road, and the cause of the same, with the names of the persons injured and the nature and extent of their injuries; also the names of the engineers and conductors under whose management such accidents have occurred, and whether such engineers and conductors are still retained in the employ of said companies; said reports shall be filed with the comptroller of the treasury, to remain in his office of record, and he shall transmit copies thereof to the legislature on the first Tuesday of February of each year; on the wilful failure of any railroad company of this state to make such report by the first Tuesday of February in each year, such company shall forfeit and pay to the state for every such omission the sum of ten thousand dollars, to be recovered in an action on contract, with costs of suit, and to be added to the public school fund of the state. [See also Act of 1910, p. 558, below.]

79. Claims of laborers. Any laborer employed by a contractor for the construction of any part of a railroad may give notice to the company of any indebtedness due him by the contractor by written notice served on an engineer, agent or superintendent of the company having charge of the section of the road on which such labor was performed, personally or by leaving at his office or usual place of business with some suitable person, which notice shall be served within twenty days after the last day of the performance of the labor for which the claim is made, and shall state the number of days' labor, the time when performed, the amount due, the name of the contractor and shall be signed by the laborer or his attorney, and said company shall be liable to pay to such laborer the amount so due to him not exceeding wages for thirty days, and an action may be maintained therefor if brought within thirty days after such service of such notice; the liability of the company shall not exceed its liability to the contractor, and any payment lawfully made to such laborer shall be a discharge to the company from the contractor for the amount so paid.

80. Agreement for sale or lease of cars. Whenever any railroad or street railway equipment and rolling stock shall hereafter be sold, leased or loaned on condition that the title to the same shall remain in the vendor, lessor or bailor until the terms of the contract as to the payment of installments or rentals or the performance of other obligations thereunder shall have been complied with, and when possession of such property shall have been delivered under such contract, such condition shall not be valid as to any subsequent judgment creditor or any subsequent purchaser for a valuable consideration without notice, unless the same shall be evidenced by writing, duly acknowledged, in the same manner as conveyances of land and which writing shall be recorded in

the office of the secretary of state when the vendee, lessee or bailee is a corporation operating its road in more than a single county, and where such line is operated in a single county, then in the office of the recorder of deeds of such county as a mortgage on goods and chattels and unless each locomotive or car shall have the name of the vendor, lessor, or bailor or his assignee plainly marked upon both sides thereof, followed by the word "owner, lessor, bailor" or "assignee," as the case may be; and the provisions of the act entitled "An act requiring contracts for the conditional sale of personal property to be recorded," approved on the ninth day of May, one thousand eight hundred and eighty-nine, shall not apply to the conditional sales of equipment and rolling stock provided for in this section.

§1. Underground railroads. Any number of persons, not less than seven, may organize a railroad corporation in the manner prescribed for the organization of corporations under this act for the purpose of constructing and operating a railroad, to be located in whole or in part beneath the surface of the earth and to be used for the transportation of minerals and of material to be used in the sinking and working of mines, or for the purpose of taking and operating any private railroad already constructed for such purpose, in whole or in part beneath the surface of the earth, and such company may charge for the transportation of freight upon so much of the same as shall be beneath the surface of the earth at the rate of twenty cents per ton per mile, and when the distance of such transportation shall be less than one mile, a fraction of a mile shall be considered as a mile for the purpose of fixing the rate; the right of way condemned for such railroad beneath the surface of the earth need not include the right to permanently use or occupy the surface above such railroad where the same is not broken, but shall be confined to a mere right to tunnel, but such corporation may nevertheless acquire, by condemnation, so much and such parts of the surface as may be necessary or proper to operate its railroad.

§2. Crossing streets in municipalities taken by condemnation. Any railroad company may construct its railroad so as to cross any portion of any street or highway in any municipality, the land for which portion has been taken for a street by condemnation under proceedings had under the charter of said municipality, and which portion shall have been, at the time of the construction of said railroad, laid on land which was under tide water in the year one thousand eight hundred and sixty-four, when the first riparian act was passed, the right to cross such street or highway to be either on a level with the actual or established grade thereof or at such distance above or below such grade as in the judgment of the proper municipal body may be best adapted to secure the safety of lines and property or promote the interests of such municipality; and such governing body shall, by ordinance, authorize the construction of such railroad and make such provision or condition concerning the same as to them shall seem desirable, and when such permission shall be given, shall have power, by like ordinance, to vacate the portion of such street or highway crossed by said railroad and such additional portion adjacent thereto as may lie between the next intersecting lines of public highways on either side of such part of said street so crossed by said railroad, or between the next intersecting line of a public highway on the one side and the end of said street nearest said railroad; any navigable basin or natural water-way, subject to the right of public navigation, shall be deemed a public highway for the purpose of defining the limit of vacation under this act; said railroad company shall pay to such municipality the amount expended by said city for all improvements of the part of the street so vacated, including the amount paid by such municipality for the land taken by it under proceedings to condemn said

land for a public street or highway or such part of the amount so expended as has not been otherwise repaid to said municipality.

83. Right to bridge the Delaware. Any railroad company of this state whose railroad shall have been heretofore or shall hereafter be constructed to the Delaware river may extend such railroad with as many tracks as it shall deem necessary by means of a bridge and its approaches to the middle of said river and there connect the same with any railroad of an adjoining state, and may change the location of its railroad or make such other improvements therein as may, in the judgment of its directors, be necessary or convenient for the purpose, and may take, by condemnation, such lands as may be necessary upon filing and recording the survey of the route and making the deposit required by law, and such company may occupy so much of the land belonging to this state as shall be required for said bridge and the piers and abutments thereof and approaches thereto upon payment to the riparian commissioners of such sum as they shall fix as compensation for said lands, and said commissioners upon receiving such payment, shall convey to said corporation such lands in fee; such company may retain the possession and use of its railroad, the location of which may be changed, if in the opinion of its directors the abandonment of such original road would be inconvenient or injurious to the interests of the public and of the railroad company.

84. Rights of foreign railroads in this state. Any railroad company created by the laws of any other state, which is authorized by law of this state to hold property and exercise franchises in this state, may hold meetings of the directors in this state, who may exercise all the powers and franchises of such company in this state so far as necessary to transact the business of the company, and may have an office in this state for the transfer of stock, and its officers and agents may transact the business of the company in this state, and any such company shall be deemed a corporation of this state for the purpose of being sued or proceeded against if insolvent in the same manner and to the same extent as if organized originally in this state, and no suit of attachment at law shall be brought against any such company; any such company may be governed by such rules and regulations as shall be adopted under its organization not repugnant to the laws of this state.

85. Effect of restraint on duties and privileges. When any railroad company shall have a duty imposed upon it or a privilege which it is authorized to exercise, and there is a time limited wherein such duty is to be discharged or such privilege exercised, and the company is restrained by the authority or intervention of any court from the discharge of the duty or the exercise of the privilege aforesaid, then so much of the time during which such restraint exists, shall not be computed as any portion of the time limited for the discharge of such duty or the exercise of such privilege.

86. Failure to operate trains. If any railroad company shall fail or neglect to run daily trains on any part of its road for the space of ten days, the chancellor, on petition of any citizen of this state, and on due proof of the facts, may speedily appoint a receiver, who shall take possession of all property of the company, real and personal, and operate said road and transact the ordinary business thereof in the transportation of freight and passengers for such time as the chancellor may direct, and all expenses incurred thereby shall be a first lien on all the earnings thereof prior to any other claim, and the surplus, if any, shall be distributed as the chancellor may direct; and the receiver shall apply all unincumbered personal effects not required in the operation of the road, and all moneys transferred to him at the time of his appointment, towards the payment of wages then due to employees of the company, not

exceeding two months' wages; this section shall not apply to any railroad at any seaside resort built principally for the transportation of summer travelers, not to a temporary suspension necessary for the completion, reconstruction or change of grade of any railroad.

87. Dissolution proceedings. When the holders of a majority of the capital stock of any railroad company which has no bonded indebtedness, and which does not receive for the operation of its road money sufficient to pay expenses, or which has not commenced or fully completed the construction of its railroad, or when the holders of ninety per centum of the capital stock of any railroad company which has for five years wholly abandoned the operation of its railroad shall desire and determine to dissolve the corporation, such company may make such dissolution by filing in the office of the secretary of state a certificate of such determination under the corporate seal of said corporation, attested by the president and secretary thereof, with the verified consent in writing signed by the said majority or ninety per centum of stockholders, whose signatures shall be verified, and upon the filing of such certificate said corporation shall be dissolved, and all its rights and franchises shall be surrendered and at an end, and thereupon the directors shall proceed, as trustees for the creditors and stockholders, to sell and convert into cash all its property and assets, and apply the same to the debts of the company and the necessary expenses of the trustee, and distribute any balance among the shareholders; the treasurer of the state shall pay to the said trustees any money of the company deposited with him at the time of the filing of the certificate of organization or survey of route, upon the production of a copy of said certificate of dissolution and on filing with him an affidavit of the president, secretary and treasurer of the company that all debts of the company have been paid; provided, however, if any railroad company shall heretofore have been or hereafter be decreed insolvent by the chancellor of this state, or any court of competent authority and a receiver of such company be appointed to wind up and administer its affairs, the chancellor of such court by whose order such receiver may be appointed, shall have power and authority, upon application by petition of such receiver, and upon such notice as may be required, to be made by the said chancellor or said court, to order the treasurer of this state to pay to said receiver any money of said insolvent company deposited at the time of its organization, or such part thereof as may remain on deposit, and upon the making of such order, the state treasurer shall pay said money so deposited, or such part thereof as may remain in his hands to said receiver, to be disposed of and distributed after the payment of the expenses of the receiver, to such creditors or stockholders as may by law be entitled to receive the same. (As amended by P. L. 1908, p. 119, c. 79.)

88. Application of act. The provisions of this act, except as herein otherwise restricted, shall apply to all railroad companies however formed, created, or organized under any law of this state; any company organized under the act for the formation of railroad companies and to regulate the same, approved April second, one thousand eight hundred and seventy-three, shall be included within the description in this act of companies organized under this act; the provisions of this act, so far as applicable, shall extend to any receiver, trustee or person operating a railroad in this state under a franchise; the railroad and property of any company organized, leased or consolidated under this act, shall be subject to taxation under the general laws of the state; a certified copy of any certificate or survey or other document filed or recorded in the office of the secretary of state, pursuant to this act, shall be evidence in all courts and places of such certificate, survey or document and of the filing and recording thereof.

89. When franchise exclusive; repealer. No franchise heretofore granted to construct a railroad or build or establish bridges or ferries or operate any line of travel and take tolls or fares therefor shall hereafter continue to be or be considered to remain exclusive, and no like franchise hereafter granted shall be or be construed to be exclusive unless in such grant heretofore or hereafter made it be so expressly provided, and all corporations organized under this act shall be subject to all general laws now or hereafter to be passed, regulating railroads and their operation; all acts and parts of acts, general and special, inconsistent with this act, are hereby repealed; such repeal shall not, however, work a dissolution of any railroad company, but the charter, certificate of incorporation, or articles of association thereof and the rights, powers and privileges conferred thereby, shall continue unaffected and unimpaired; this repealer shall not, however, revive any act heretofore repealed.

A SUPPLEMENT TO "AN ACT TO PREVENT FRAUDS BY INCORPORATED COMPANIES," APPROVED APRIL FIFTEENTH, EIGHTEEN HUNDRED AND FORTY-SIX.¹

1. Whenever a railroad, canal or turnpike company becomes insolvent, receivers or trustees may be appointed; powers. That whenever any railroad, canal or turnpike company, incorporated under the laws of this state, have become insolvent, or failed for ninety days after the same becomes due, to pay the principal or interest on any mortgage on the property and franchises of such company, it shall be lawful for the chancellor, upon the application of any creditor, mortgagee or stockholder of such company, to appoint a receiver or receivers, or three trustees, who shall have and exercise all the powers and authority that it is lawful for receivers and trustees to exercise under the act to which this is a supplement; and it shall be lawful for such receivers or trustees to sell or lease the canal, railroad or turnpike belonging to such company, together with all the chartered rights, privileges and franchises of such company; and the purchaser or purchasers, lessee or lessees of such work, chartered rights, privileges and franchises, shall thereafter hold, use and enjoy the same during the whole of the residue of the term limited in the charter of such company, or during the term in such lease specified, in as full and ample a manner as the stockholders of such company could or might have enjoyed the same, subject, however, to all the restrictions, limitations and conditions contained in such charter; and upon filing in the office of the secretary of state, within six months after such sale or lease, a certificate that they accept the charter of the company whose property has been sold or leased, under some corporate name different from that of the said company, such purchasers or lessees shall become a corporation under the name so specified, with all the powers, rights, privileges and franchises of the former company; the lessees or purchasers, or corporation formed by them as aforesaid, shall hold and enjoy the same, free and clear of all debts, claims and demands of creditors, mortgagees or stockholders, who shall look only to the fund arising from such lease or sale, which money, as collected, shall be paid into the court of chancery; but where such property is subject to a mortgage the chancellor may, with the consent of the plaintiff, or without such consent if the principal is not due, direct a sale or lease to be made subject to the lien of the mortgage.

¹—Approved March 17, 1870, P. L. 1870, p. 55; G. S., p. 973. The act to which this is a supplement is now incorporated in the act entitled "An act concerning corporations," beginning page 475 above, section 63 et seq.

A FURTHER SUPPLEMENT TO AN ACT ENTITLED "AN ACT TO PREVENT FRAUDS BY INCORPORATED COMPANIES," APPROVED APRIL FIFTEENTH, ONE THOUSAND EIGHT HUNDRED AND FORTY-SIX.¹

1. Receiver of insolvent railroad to operate road subject to order of chancellor. That whenever any incorporated railroad company in this state shall become insolvent, and the property of such company shall have passed into the hands of a receiver by order of the chancellor, in accordance with the act to which this is a supplement, the receiver shall, and he is hereby empowered to operate said railroad for the use of the public, subject at all times to the order of the chancellor; and all expenses incident to the operation of said railroad shall be a first lien on the receipts, to be paid before any other incumbrance whatever.

A FURTHER SUPPLEMENT TO AN ACT ENTITLED "AN ACT TO PREVENT FRAUDS BY INCORPORATED COMPANIES," APPROVED APRIL FIFTEENTH, ONE THOUSAND EIGHT HUNDRED AND FORTY-SIX.²

1. Conditions on which receiver may lease a railroad. That no lease of any railroad shall be made by any trustee or receiver appointed by the court of chancery or the chancellor, except upon a rental and adequate security for the payment of the same, both to be first approved by said court and a majority of stockholders of said railroad in interest, upon such public notice to the parties in interest as said court shall direct.

A SUPPLEMENT TO AN ACT ENTITLED "AN ACT CONCERNING RAILROAD CORPORATIONS," APPROVED MARCH SIXTH, EIGHTEEN HUNDRED SEVENTY-SEVEN.³

1. Corporation may take and acquire title to lands necessary to straighten or shorten route of railroad. That it shall be lawful for any railroad corporation, created by special act, or as lessees thereof, owning or operating a railroad within this state, to take and acquire title in the manner prescribed by the act under which such railroad may have been originally constructed, or under which power may have been at any time conferred or derived by way of supplement, or otherwise, to all such lands as shall be necessary, in the judgment of the directors of said corporation, to straighten or shorten the route of said railroad, or to connect points thereon by shorter lines or branches, and to all such lands as shall be necessary as aforesaid for the erection of freight and passenger depots and all the legitimate purposes of said company upon such shortened or connecting line; and said corporations are hereby again invested for this purpose with all the powers, privileges and franchises given in said act for acquiring and taking title to lands required for their use; provided, that no more than one hundred feet in width for the main track of any road shall be taken for the right of way, except where for the depth of cut or the height of embankment more is necessary to be taken.

2. Corporation having established route may transfer same to another company. That if any corporation shall have been already organized and shall have established a route which, when constructed, would

1—Approved February 11, 1874; P. L. 1874, p. 11; G. S., p. 974.

2—Approved April 9, 1875; P. L. 1875, p. 107; G. S., p. 974.

3—Approved March 27, 1878; P. L. 1878, p. 179, c. 114; G. S., 2694.

straighten or shorten the route of any other railroad corporation aforesaid, or would connect points thereon, forming thereby, in connection therewith, a shorter line therefor, such first herein-mentioned corporation is hereby authorized to transfer such route and any land or right of way by it taken, acquired or agreed for to such other railroad corporation, and such last-mentioned railroad corporation is hereby authorized to receive and acquire such route, land or right of way and to possess the same as the successors and assigns of said first herein-mentioned corporation, subject only to the conditions of any grant thereof; provided always, that this section of this act shall not authorize condemnation in any case where such connecting, straightening or shortening route shall have been actually constructed and in operation, that such connecting, shortening, straightening or widening shall not be made within the limits of any incorporated city.

3. Time when act takes effect. That this act shall take effect immediately.

AN ACT TO AUTHORIZE RAILROAD CORPORATIONS TO CONSTRUCT, ACQUIRE, MAINTAIN AND OPERATE LINES OF TELEGRAPH FOR COMMERCIAL AND PUBLIC USES.¹

1. Railroad corporations empowered to operate lines of telegraph over and upon their lands, etc. That it shall be lawful for every railroad corporation of this state, organized by virtue of any special act of incorporation, or otherwise, and for every railroad corporation organized under the laws of another state, but leasing or operating a railroad or canal in this state, and such corporations are hereby authorized and empowered to erect, establish and maintain a line or lines of telegraph for public use, over, along and upon the lands and rights of way of such railroad corporations, and over, along and upon the lands and rights of way of such railroad and canal corporations of which such railroad corporation may be the lessee or operator, and over, along and upon the lands and rights of way of any other railroad corporation, with the consent, and not otherwise, of such other railroad corporation, and to erect, establish and maintain extensions of such telegraph line or lines in any direction from such primary or main line, for such distance as may be necessary to reach business centers, over, along and upon the public roads and highways of this state, or otherwise; provided, that the use of public streets in any incorporated city of this state, for the erection of such extensions of said telegraph line, shall be subject to such reasonable regulations as may be imposed by the corporate authorities of said cities.

2. Offices to be established and maintained for transmission of messages. That it shall be the duty of every railroad corporation availing itself of this act to establish, maintain and keep open, for the reception and transmission of messages by its telegraph lines, at least one office in every twenty-five miles traversed by its said lines of telegraph; and it shall be the duty of said railroad corporation to receive and transmit all messages tendered for transmission, upon being paid such charges as by law the said corporation may charge for such service.

3. Rates that may be charged. That any railroad corporation availing itself of this act shall be and hereby is authorized to charge, receive and to collect, before transmission, for each message of not more than ten words twenty-five cents, and for each additional word one cent; provided, however, that said messages are intended to be transmitted

¹—Approved February 17, 1881, P. L. 1881, p. 31, c. 25; G. S., p. 2702.

only over the telegraph lines of the company to whom such messages are tendered.

4. Railroad corporations may make arrangements with other railroad or telegraph companies, etc. That it shall be lawful for any railroad corporation availing itself of this act, and it is hereby authorized and empowered to enter into, make and perfect such business arrangements with any other railroad or telegraph corporation of this or of any state, as shall be mutually agreed upon by said corporations, for the reception and transmission of messages over the telegraph lines of said railroad and telegraph corporations; and for all messages to be transmitted over the telegraph lines of other corporations, every railroad corporation availing itself of this act, to whom such messages shall be tendered, may charge, receive and collect reasonable and customary rates for such transmission.

5. Time when act takes effect; repealer. That this act shall take effect immediately, and all acts and parts of acts inconsistent herewith are hereby repealed.

AN ACT TO AUTHORIZE ANY TOWN OR CITY OF THIS STATE TO ENTER INTO CONTRACTS WITH RAILROAD COMPANIES WHOSE ROADS ENTER THEIR CORPORATE LIMITS, TO CHANGE OR ELEVATE THEIR RAILROADS, AND, WHEN NECESSARY FOR THAT PURPOSE, TO VACATE, CHANGE THE GRADE OF, OR ALTER THE LINES OF ANY STREETS OR HIGHWAYS THEREIN.¹

1. Municipalities may contract with railroads to abolish grade crossings. The proper municipal authorities respectively of any town or city of this state be and they are hereby authorized and empowered to enter into such contracts with any of the railroad companies whose roads now or hereafter may enter or lie within their respective towns or cities, as shall secure greater safety to persons and property therein, or facilitate the construction and maintenance of other than grade crossings of streets or highways, whereby the said railroad companies or any of them may locate, relocate, change, alter grades of, depress or elevate their railroads within said towns or cities or either of them, as in the judgment of such municipal authorities respectively may be best adapted to secure the safety of lives and properties, or to provide for other than grade crossings of streets or highways therein, or to promote the interest of said towns or cities respectively, and for that purpose shall have power to open, vacate, alter the lines or change the grades of any streets or highways or any part thereof within said towns or cities or either of them, and to do all such acts as may be necessary and proper to effectually carry out such contracts.

2. Provision for costs. Said town or city shall provide the money necessary to do the work and make the payments required by any such contract, by the levy of a general tax for one or more years, or by the issue and sale of bonds of such town or city, to run not exceeding ten years at a rate of interest not exceeding five per centum per annum; such town or city shall have power, by annual taxation or otherwise, to provide a sinking fund for the retirement of said bonds.

3. When act takes effect. This act shall take effect immediately.

¹—Approved March 20, 1901, P. L. 1901, p. 116, c. 63.

²—By an amendatory act of April 3, 1902 (P. L., p. 402, c. 129) the word "ten" was changed to "fifty." But by Act of March 29, 1904 (P. L. 317) such amendatory act was apparently repealed.

A SUPPLEMENT TO AN ACT ENTITLED "AN ACT CONCERNING RAILROADS"
(REVISION OF 1903), APPROVED APRIL FOURTEENTH, ONE THOUSAND
NINE HUNDRED AND THREE.¹

1. Third rail protected at crossings. Any corporation operating a railroad in this state, whether as owner, lessee or otherwise, on which the cars are operated by means of electric energy or current conveyed along the right of way of said railroad by means of a third rail or rails laid at or near grade, shall securely cover said electrified third rail or rails with wood or some other non-conducting material for a distance of seventy-five feet on each side of all grade crossings over the right of way of said railroad leaving only sufficient opening for contact by the shoe or other apparatus used to convey the electric current from said electrified third rail to the cars used on said railroad.

2. Penalty for non-compliance. Any corporation violating the provisions of this act shall be subject to a penalty of five hundred dollars and costs for each offense, to be recovered by any citizen of this state who may sue for the same in any court having jurisdiction of the same, one-fifth of said fine to go to the person suing for the same, and four-fifths thereof to be paid to the treasurer of the state for the use of the state.

3. Unprotected rail evidence per se. In all suits or actions commenced or brought against any corporation operating a railroad in the manner referred to in the first section of this act, for injuries sustained by contact with an electrified third rail laid as set out in the first section hereof, it shall be considered per se negligence on the part of said corporation defendant if said third rail shall be not covered and protected in the manner herein provided.

4. Time when act takes effect. This act shall take effect on the first day of October, one thousand nine hundred and eight.

AN ACT RELATING TO ACCIDENTS AT RAILROAD CROSSINGS.²

PREAMBLE.

Whereas, by the provisions of the statutes of this state, it has been provided that whenever a railroad company shall have enclosed its right of way through any incorporated city of this state with a fence, wall or embankment, and shall have established and maintained gates at street crossings, as provided by the provisions of any statute of this state, that upon such compliance with such provisions the said railroad company could run over the part of their said so enclosed road through any incorporated city of this state "at any rate of speed they may deem proper, and that such speed should not, thereafter, be restrained by any city ordinance to regulate the same," therefore,

1. Question of contributory negligence, determined by jury. Whenever any railroad company shall have assumed to establish and maintain what are known as safety gates at any railroad crossing in this state, and a person is killed or injured at any such crossing by being struck by a locomotive or train when attempting to cross the tracks at a time when such gates are not down, as required by any statute giving the railroad the right to run through an incorporated city at any rate of speed they see fit, upon compliance with the provisions of such statute, that in all such cases the question whether the person so killed or injured, upon attempting to cross such railroad crossing, at a time when

1—Approved March 31, 1909, P. L. 1909, p. 54, c. 35.

2—Approved April 9, 1908, P. L. 1908, p. 208, c. 139.

the safety gates at such crossing are not down, was or was not guilty of contributory negligence shall be a question to be determined by the jury, in all actions brought to recover damages for such loss of life or personal injury.

2. Repealer. All acts or parts of acts inconsistent with this act are hereby repealed, and this act shall take effect immediately.

AN ACT WITH REFERENCE TO THE DEGREE OF CARE NECESSARY TO BE USED BY TRAVELLERS OVER RAILROAD CROSSINGS PROTECTED BY FLAG-MAN OR SAFETY APPLIANCES OR BOTH.¹

1. Wherever any railroad whose right of way crosses any public street or highway, has or shall install any safety gates, bell or other device designed to protect the traveling public at any crossing or has placed at such crossing a flagman, any person or persons approaching any such crossing so protected as aforesaid, shall, during such hours as posted notice at such crossing shall specify, be entitled to assume that such safety gate or other warning appliances are in good and proper order, and will be duly and properly operated unless a written notice bearing the inscription "out of order" be posted in a conspicuous place at such crossing, or that the said flagman will guard said crossing with sufficient care whereby such traveler or travelers will be warned of any danger in passing over said crossing, and in any action, brought for injuries to person or property, or for death caused at any crossing protected as aforesaid, no plaintiff shall be barred of the action because of his failure of the person injured or killed to stop, look and listen before passing over said crossing.

2. This act shall take effect immediately.

AN ACT TO REGULATE THE USE OF WATER CLOSETS AND URINALS ON RAILROAD TRAINS AND OTHER PUBLIC CONVEYANCES.²

1. Boundaries of watershed wholly in state set out. Upon the formal request of the board of water commissioners, or other board or official having charge of the public water supply of any city of this state, which said water supply is derived from surface drainage in any watershed wholly within this state, it shall be the duty of the board of health of the state of New Jersey to prescribe and fix territorial limitations bounding such watershed, which shall thereafter be known as watershed. The name of such watershed to be inserted in the certificate hereinafter provided.

2. Notice to public and railroad affected. The board of water commissioners, or other board or official making such application to the board of health of the state of New Jersey, shall, upon the certificate of the said board setting out the boundaries of the said watershed, give public notice of such establishment, by advertisement in two newspapers of general circulation in the vicinity of the said watershed, at least once a week for four weeks, which advertisement shall run in the name of the board of health of the state of New Jersey, and shall contain such sufficient description of the boundaries adopted as will identify the said watershed and the boundaries thereof, and a copy thereof be served upon

1—Approved April 14, 1909, P. L. 1909, p. 137, c. 96.

2—Approved April 17, 1909, P. L. 1909, p. 213, c. 141.

any agent in charge of any ticket office of any railroad affected by the provisions of this act.

3. No discharge into such watershed. When such territorial limitations for any such watershed shall have been established by the board of health of the state of New Jersey, and notice thereof shall have been given in the manner herein prescribed, it shall thereafter be unlawful for any railroad company operating trains, or steamboat or power-boat company operating boats within the territorial limitations of such watershed, to discharge or allow any discharge from water-closets and urinals upon railroad trains or any such steam or other power boats as may be operated therein within the territorial limitations prescribed for such watershed.

4. Penalty; how recoverable. Every corporation violating the provisions of this act shall incur a penalty of not exceeding one hundred dollars, to be recovered in an action of debt at the suit of the board of water commissioners or other board or official having charge of the water supply of such city as shall derive its supply from said watershed; and all moneys which shall be recovered in such manner shall be paid into the treasury of the state; and every person violating any provision of this act shall be guilty of a misdemeanor.

5. Time when act takes effect. This act shall take effect immediately.

AN ACT TO AMEND AN ACT ENTITLED "A FURTHER SUPPLEMENT TO AN ACT ENTITLED 'AN ACT RESPECTING ANNUAL REPORTS TO THE LEGISLATURE OF RAILROAD AND CANAL COMPANIES,' APPROVED FEBRUARY TWENTY-FOURTH, ONE THOUSAND EIGHT HUNDRED AND FIFTY-TWO," APPROVED APRIL THIRD, ONE THOUSAND EIGHT HUNDRED AND SEVENTY-THREE.¹

1. Section one of the act of which this act is amendatory be and the same is hereby amended to read as follows:

1. Annual reports transmitted to comptroller. The reports required to be made annually to the legislature by the several railroad and canal companies of this state, as provided by an act entitled "An act respecting annual reports to the legislature of railroad and canal companies," approved February twenty-fourth, one thousand eight hundred and fifty-two, and the acts amendatory thereof and supplementary thereto, shall hereafter be transmitted to the comptroller of the treasury, who shall file the same in his office, there to remain of record, and such parts or portions of said report shall be printed as the state comptroller and the state commissioner of reports may designate.

2. Time when act takes effect. This act shall take effect immediately.

AN ACT CONCERNING THE LIABILITY OF RAILROADS FOR INJURY TO PERSONS OR PROPERTY CAUSED BY RUNNING CARS ACROSS PUBLIC STREETS AND HIGHWAYS AT WHICH CROSSINGS NO SAFETY GATES, BELL OR OTHER DEVICE TO GIVE WARNING TO THE TRAVELING PUBLIC HAVE BEEN INSTALLED.²

1. Jury to determine responsibility in grade crossing suits. In any action against any steam railroad company brought to recover damages for injuries or death occurring at any crossing of the right of way of

1—Approved April 12, 1910, P. L. 1910, p. 485, c. 275. [See also § 78 of the railroad act of 1903, above.]

2—Approved April 12, 1910, P. L. 1910, p. 490, c. 278.

such steam railroad company, where such company has not installed any safety gates, bell or device usually employed to warn and protect the traveling public at such crossing, which injuries or death are alleged to be due to the negligence of said railroad company or its agents, the plaintiff in such action shall not be non-suited on the ground of contributory negligence on his own part or on the part of the person for whom such suit is brought, but in all such cases it shall be left to the jury to determine whether the person injured or killed was exercising due and reasonable care under the conditions existing at said crossing at the time of such injury or death, and if the jury shall determine that the person injured or killed was not exercising due and reasonable care under the conditions existing at the said crossing at the time of such injury or death, the verdict shall be against the plaintiff and in favor of the defendant.

2. Repealer. All acts and parts of acts inconsistent with the provisions of this act be and the same are hereby repealed.

3. Time when act takes effect. This act shall take effect immediately.

S. SEWERAGE COMPANIES.

AN ACT FOR THE CONSTRUCTION, MAINTENANCE AND OPERATION OF SYSTEMS OF SEWERAGE IN ANY MUNICIPALITY IN THIS STATE.¹

1. Formation of company to operate sewerage system. Any number of persons, not less than seven, a majority of whom shall reside in this state, may form a company for the purpose of constructing, maintaining and operating a system of sewerage in any municipality in this state, whether created by any general or special law, for the purpose of supplying said municipality and the inhabitants thereof with an adequate means of disposing of sewerage.

2. Incorporators to file certificate stating certain facts. Such persons desirous of forming a company for such purpose shall make, sign and acknowledge, before some officer authorized to take acknowledgments of deeds, a certificate in writing which shall state the corporate name adopted by the company, the amount of the capital stock, the term of its existence, the number of directors, the names of those who shall manage the affairs of the company for the first year, or until their successors are elected and qualified, and the name of the municipality in or for which such sewerage system is to be constructed and the business of such company carried on; such certificate shall be filed in the office of the secretary of state, together with the consent in writing of and the terms and condition or conditions upon which the consent has been granted by the corporate authorities, if any, of the municipality in which such sewerage system is to be constructed; provided, however, that the corporate authorities of any municipality shall not give said written consent unless a petition shall have been presented requesting the granting of such consent, which petition shall be signed by the owners of real estate in said municipality to the extent of at least one-half of the number of persons who, in the last preceding municipal assessment of taxes, have been assessed as the owners of the real estate in all that portion of the said municipality designated as within the limits of the proposed sewerage system on the maps and specifications of the same in this act provided for.

3. Powers. When such certificate, conditions and consent shall have been filed as aforesaid, the persons who shall have signed and acknowl-

¹—Approved June 13, 1898, P. L. 1898, p. 484, c. 210.

edged the same, and their successors, shall be a body politic and corporate, and shall have power as such to build, erect, alter, repair, enlarge and maintain all necessary works and apparatus within or without such municipality, and to lay down all such pipes and conduits for sewerage at such times and in such places as shall be necessary and proper to enable said corporation to carry into effect the purposes of its incorporation.

4. Lawful to enter upon lands. It shall be lawful for such corporation to enter upon any and all lands in the neighborhood of the municipality which it is intended to supply with such system of sewerage, and to make all such preliminary examinations, explorations, measurements and levelings as may be necessary and proper for its corporate purposes, doing thereby as little damage as possible to the owner or owners.

5. Proceedings in case of disagreement with owner of land. In case said corporation cannot agree with the owner or owners, or other persons interested in any lands which said corporation may desire to take, use and occupy, as to the amount of compensation to be paid to such owner or owners for such taking, use or occupation, it shall be lawful for any justice of the supreme court of this state, upon application by the said corporation and upon two weeks' previous notice, served in person or by leaving at the dwelling-house or usual place of abode of such owner or owners; or, in case of absence from the state or legal disability, published in at least two official newspapers published nearest to the lands in question, to appoint three disinterested commissioners, residents of the county in which said lands are situated, to assess and ascertain the value of the lands so proposed to be taken, used and occupied, and the damages to be done to any lands by the laying down of such pipes and erection and maintenance of such works; which commissioners shall appoint a time and place at which they shall meet to execute the duties of their appointment, and shall cause two weeks' notice thereof to be given to the parties interested therein, either by personal service or by publication in at least two official newspapers published in the county where such lands may lie; at which time and place the said commissioners shall meet and view the premises, and hear the parties interested, and take evidence, if any be offered; and for that purpose shall have power to administer oaths or affirmations and to adjourn from day to day, and, in case of the refusal or failure of either or any of said commissioners to attend and perform their said duties, the said judge shall have power to appoint another or other disinterested person or persons as commissioners to act in the place of such absent commissioner or commissioners; and the said corporation shall make an exhibit to the said commissioners, at their meeting aforesaid, for the use of the parties interested, a statement and description, in writing, or by drawings or maps, or both, of the lands by them sought to be taken as aforesaid, and of the use, occupation of and excavations upon any lands by them sought to be made; and the said commissioners shall thereupon ascertain and assess the value and damages aforesaid, and shall execute, under their hands and seals, or the hands and seals of a majority of them, an award to the said corporation of the lands, rights and privileges by them sought in the statements and description aforesaid, stating therein the amount of damages and compensation therefor by them assessed in favor of such owner or owners; which award shall be by them acknowledged and filed in the county clerk's office, and by him recorded in the registry of deeds.

6. Tender of payment before entering upon lands. Before taking possession of any such lands or entering thereon for the purpose of making any excavation or occupation thereof, the said corporation shall pay or tender to such owner or owners, or, in case of absence from the state or

legal disability, shall deposit with the clerk of the circuit court of said county the amount of damages so awarded and the award of said commissioners, and the payment or tender or deposit as aforesaid of such damages shall vest in said corporation the lands, rights and privileges by them sought, described and set forth in said statement and description, in all respects as if the same had been conveyed to the said corporation by said owner or owners under their hands and seals.

7. Proceedings in case of aggrevance by assessment. If either party feel aggrieved by said assessment and award, such party may appeal to the next or second term of the circuit court of said county by petition and notice thereof, served upon the opposite party two weeks prior to such term, or published a like space in at least two official newspapers published nearest the lands in question, which petition and notice, so served or published, shall vest in said court full power to hear and determine said appeal, and, if required, they shall award a venire for a jury to come before them, who shall hear and finally determine the issue under the direction of the court, as in other trials by jury, and it shall be the duty of the said jury to assess the damages to the said lands as above mentioned, and the value of such as shall be absolutely taken; and the said court shall have power to order a struck jury or a jury of view, or both, to try any such appeal, and also to order any jury which may be impaneled and sworn to try any such appeal to view the premises in question during said trial; and the right of said corporation to appeal from and dispute the correctness of any award shall not be waived or taken away by the paying or tendering the amount of the award and taking possession of the land or exercising the rights covered by such award; and the right of any owner of any such lands or rights in like manner to appeal shall not be waived or lost by the acceptance of the amount so awarded when tendered; and upon the final determination of any such appeal the said court shall render such judgment in favor of the one party and against the other as the right and justice of the case shall require, and shall award to the party substantially succeeding and prevailing in said appeal his, her or their costs of said appeal against the opposite party, and shall have power to enforce the judgment so rendered by execution as other judgments are enforced, and also by summary proceedings and attachments for non-payment thereof.

8. Management of company. The business of said company shall be managed by a board of directors of not less than five, who shall be stockholders therein, and a majority of whom shall be residents of this state; and a majority of the directors chosen shall be a quorum; and there shall be an election of directors within one year from the filing of the articles of association, and annually thereafter at such time as shall be fixed by the by-laws of the said company; three weeks' notice thereof shall be given by publication in at least two official newspapers, if so many there be, in general circulation in such municipality; the stockholders shall be entitled to vote either in person or by proxy.

9. Officers. The officers of such company shall be a president, who shall be one of the directors; a secretary and treasurer, and such other officers, agents and servants as the board of directors shall deem necessary; such officers shall be elected annually by the directors, and shall be required to give bond, with penalty and surety to be approved of by said board of directors, conditioned for the faithful discharge of their duties.

10. Capital stock. The amount of the capital stock shall be fixed by the company, but may be increased by a vote of the stockholders at any annual meeting, and such capital stock be divided into shares of not more than one hundred dollars each.

11. Penalty for damaging property. If any person or persons shall willfully do or cause to be done any act or acts whatever, thereby to injury any conduit, pipe, cock, machine or structure whatsoever, or anything appertaining to the works of said corporation, whereby the same may be stopped, obstructed or injured, the person or persons so offending shall be considered guilty of a misdemeanor, and, being convicted thereof, shall be punished by a fine not exceeding three hundred dollars, or imprisonment at hard labor not exceeding two years, or both; provided, such criminal prosecution shall not in anywise impair the rights of action for damages by a civil suit, hereby authorized to be brought for any such injury, as aforesaid, by and in the name of the corporation, in any court of this state having cognizance of the same.

12. Consent of municipality may be conditioned upon specified payments. Upon application the corporate authorities of any such municipality for the consent of such authorities as provided in section two of this act, said authorities may, by ordinance, provide that such consent shall be conditioned upon the payment to such municipality of a specified sum of money, or upon the quarterly, semi-annual or annual payment to said municipality of specified sums of money or upon payment of specified quarterly, semi-annual or annual percentage of the gross receipts of the corporation to be formed pursuant to such consent; and said corporate authorities shall annex to such consent the maximum prices or rents that may be charged property owners or others for the use of such sewerage system, and any further or other terms and condition or conditions upon which said consent is granted; if the certificate referred to in section two hereof be filed, there shall be annexed thereto and filed therewith a copy of the terms and condition or conditions upon which such consent is granted, and such filing shall be conclusive evidence that said corporation has assented to said terms and condition or conditions, and the same shall be deemed and taken to be binding and operative upon said corporation, its successors and assigns.

13. Authorized to use streets, etc. Such company be and they are hereby fully authorized and empowered to lay their pipes beneath such public roads, streets, avenues and alleys as they may deem necessary for the purposes aforesaid, upon complying with the terms and condition or conditions upon which the consent of the corporate authorities shall have been obtained; provided, that the said pipes shall be laid at least three feet below the surface of the said roads, streets, avenues or alleys, and shall not in any wise unnecessarily obstruct or interfere with public travel or damage public or private property; and provided, that the consent shall be obtained of the corporate authorities, if any there be of any municipality through which the same may be laid; provided, however, that no consent shall be granted by the corporate authorities to such company to lay their pipes beneath such public roads, streets, avenues or alleys for the purposes aforesaid until a map and specifications of the proposed system of sewerage shall have been submitted to the state board of health and to the corporate authorities of any such municipality in which such system of sewerage is proposed, and the map and specifications shall have been approved by them.

14. Rental. Said company may contract with property owners and others for the use of said system of sewerage for such price or prices, or quarterly or annual rents, and such restrictions as said company may think proper, provided, that the same shall in no case exceed the maximum rates which may be named in the terms and condition or conditions on which the consent of the corporate authorities shall have been obtained.

15. Period of completion. Such company shall commence the construction of the proposed system of sewerage within six months from

the date of their organization, and shall complete the same within three years from the date of commencement; provided, that pursuant to section twelve of this act, the conditions to be annexed to the consent of the corporate authorities may designate a shorter period for the completion of such works.

16. Time when act takes effect. This act shall take effect immediately.

AN ACT VALIDATING AND CONFIRMING ORDINANCES HERETOFORE GRANTED BY ANY MUNICIPALITY TO ANY SEWERAGE CORPORATION, VESTING IN SUCH CORPORATION THE RIGHT TO LAY PIPES BENEATH THE SURFACE OF THE STREETS AND HIGHWAYS OF SUCH MUNICIPALITY, AND VALIDATING THE ACTS AND PROCEEDINGS OF SUCH CORPORATION THEREUNDER.¹

1. Where any sewerage corporation has heretofore laid pipes beneath the surface of the streets and highways of any municipality and constructed and operated its plant therein, under and by virtue of an ordinance of such municipality, which ordinance may be invalid as a grant by reason of defective incorporation or lack of power in said corporation to receive, or said municipality to pass such ordinance, such ordinance and all acts and proceedings thereunder are hereby validated and confirmed; provided, however, that this act is not to affect any pending litigation, if any, attacking the validity of such ordinance.

2. Time when act takes effect. This act shall take effect immediately.

AN ACT VALIDATING AND CONFIRMING THE INCORPORATION OF ALL CORPORATIONS INCORPORATED UNDER THE ACT ENTITLED "AN ACT CONCERNING CORPORATIONS," APPROVED APRIL SEVENTH, ONE THOUSAND EIGHT HUNDRED AND SEVENTY-FIVE, OR UNDER THE ACT ENTITLED "AN ACT CONCERNING CORPORATIONS (REVISION OF 1896)," APPROVED APRIL TWENTY-FIFTH, ONE THOUSAND EIGHT HUNDRED AND NINETY-SIX, FOR THE PURPOSE OF CONSTRUCTING AND MAINTAINING A SEWERAGE PLANT IN ANY MUNICIPALITY OF THE STATE, AND WHICH HAVE CONSTRUCTED AND MAINTAINED SUCH PLANT UNDER AND IN PURSUANCE OF SUCH INCORPORATION, AND AN ORDINANCE OF SUCH MUNICIPALITY GRANTING THE RIGHT TO USE THE STREETS AND HIGHWAYS.²

PREAMBLE.

Whereas, companies have incorporated under the act entitled "An Act concerning corporations," for the purpose of constructing and maintaining a sewerage plant in municipalities of this state, and have constructed and maintained such plant under and in pursuance of such incorporation; and whereas such incorporation may have been invalid by reason of the failure to incorporate under the act providing for the incorporation of sewerage companies.

1. Validating incorporation of certain corporations. Where any corporation has heretofore incorporated under the act entitled "An act concerning corporations," for the purpose of constructing and maintaining a sewerage plant in any municipality of this state, and has constructed and maintained such plant under and in pursuance of such incorpora-

1—Approved April 1, 1908, P. L. 1908, p. 87, c. 50.

2—Approved April 1, 1908, P. L. 1908, p. 88, c. 51.

tion and an ordinance of such municipality granting the right to use the streets and highways, such incorporation be and the same is validated and confirmed to all intents and purposes as though incorporated under the act providing for the incorporation of sewerage companies; provided, no pending litigation is to be affected.

2. Time when act takes effect. This act shall take effect immediately.

9. STREET RAILWAY AND TRACTION COMPANIES.

STREET RAILWAY COMPANIES ACT OF 1886.

AN ACT TO PROVIDE FOR THE INCORPORATION OF STREET RAILWAY COMPANIES AND TO REGULATE THE SAME.¹

1. Seven or more persons may form corporation. That seven or more persons may associate themselves together by articles in writing for the purpose of forming a corporation to construct, maintain and operate a street railway for the transportation of passengers.

2. Articles of association, and what they shall set forth; to be filed and recorded. That the articles of association shall state the name of the company, the number of years the same is to continue, the points to and from which the road is to be constructed, the length of such road as near as may be, the name of each municipality, township and county in this state through, in or into which it is intended to be made, the amount of the capital stock of the company, which shall not be less than ten thousand dollars for every mile of road intended to be constructed, and a proportionate sum, as near as may be, for fractions of a mile, and the number of shares of which said capital stock shall consist, and the names and residences of at least seven directors, who shall serve for one year and until their successors shall have been chosen, and a majority of whom shall be inhabitants of the municipalities through which said road is intended to be constructed and operated; each subscriber to such articles of incorporation shall subscribe thereto his place of residence and the number of shares of stock which he agrees to take in said company; on compliance with the requirements of the third section of this act, such articles of association may be tendered to the secretary of state, to be filed in his office, and it shall be his duty to indorse thereon the day and year they were filed and record the same in a book to be provided by him for that purpose; upon so tendering the said articles of association, after the doing of the things required by the third section of this act, the persons who shall have so subscribed such articles of association, and all persons who shall thereafter become stockholders in such company, shall be and remain a corporation by the name specified in such articles of association.

3. Articles not to be filed or recorded until payment of capital stock. That such articles of association shall not be tendered to the secretary of state, nor filed and recorded in his office, until at least two thousand dollars of stock for every mile of railroad and a proportionate sum of every fraction of a mile thereof proposed to be constructed shall have been subscribed and paid for in good faith and in cash to the directors named in said articles of association, nor until the said directors shall have deposited the said moneys so subscribed and paid to them with the treasurer of the state of New Jersey, who shall hold the same subject to be repaid to the directors or treasurer of the said company in sums of two thousand dollars for each mile of said road upon the construction

¹—Approved April 6, 1886, P. L. 1886, p. 185; G. S., p. 3216.

of which it shall be proved to his satisfaction that the said company have expended the sum of two thousand dollars, nor until there is indorsed on such articles of association, or annexed thereto, an affidavit made by at least five of the directors named in said articles that the amount of stock required by this section has been in good faith subscribed and paid in cash as aforesaid, whether the same be full payment on said stock or installments thereon only, and that it is intended in good faith to construct, maintain and operate the road mentioned in such articles of association or as its route may be designated by the authorities of the municipalities and townships in or through which it is intended the road, and such affidavit shall be recorded with the articles of association as aforesaid.

4. Copy of articles evidence of incorporation. That a copy of the articles of association filed and recorded in pursuance of this act, or of the record thereof, with a copy of the affidavit aforesaid indorsed thereon or annexed thereto, and certified to be a copy by the secretary of state, shall be presumptive evidence of the incorporation of the company named therein and of the facts therein stated.

5. Powers. That every railway company incorporated under this act shall be deemed to have power:

I. To have succession. To have succession by its corporate name for the period limited in its charter or certificate of incorporation;

II. To sue and be sued. To sue and be sued, complain and defend in any court of law or equity;

III. Common seal. To make and use a common seal and alter the same at pleasure.

IV. Hold real and personal property. To hold, purchase, receive and convey such real and personal property as the purposes of the corporation shall require;

V. May appoint officers. To appoint such subordinate officers and agents as the business of the corporation shall desire, and to allow them a suitable compensation;

VI. May make by-laws and regulations. To make by-laws not inconsistent with the constitution or laws of the United States or of this state, fixing and altering the number of its directors for the management of its property, the regulation and government of its affairs, with penalties for the breach thereof not exceeding twenty dollars;

VII. May wind up and dissolve. To wind up and dissolve itself upon the payment and settlement of its lawful liabilities and debts and the performance of its duties, upon filing a certificate to that effect in the office of the secretary of state, signed and sworn to by the president and directors of the company;

VIII. Other necessary powers. To have all other powers necessary to the performance of its duties under this act.

6. Meetings of company; voting; quorum. That at all meetings of any company incorporated under this act absent stockholders may vote by proxy, authorized in writing; and every company may determine by its by-laws the manner of calling and conducting all meetings, what number of shares shall entitle the stockholders to one or more votes, what number of stockholders shall attend either in person or by proxy, or what number of shares or amount of interest shall be represented at any meeting in order to constitute a quorum; and if the quorum shall not be so determined by the company, a majority of the stockholders in interest, represented either in person or by proxy, shall constitute a quorum.

7. Number of directors and term of office; president, how elected. That the directors shall be the governing board of any such company, and shall consist of not less than seven in number, and they shall be

chosen annually by the stockholders at such time and place as shall be provided by the by-laws of the company, and shall hold their office for one year and until others are chosen and qualified in their stead; and one of the directors shall be chosen president, either by the directors or by the stockholders, as they shall be directed by the by-laws.

8. Notice of proposed location of track; ordinance authorized. The board of aldermen common council or township committee of any municipality or township, upon the petition of the directors of any company incorporated under this act or a majority thereof, for a location of the tracks of its railway therein, conformably to the route designated in their articles of incorporation or for an extension of the same, shall give notice to all parties interested, by publication in one or more newspapers published and circulated in said municipality, or if none be published there, then by posting in five of the most public places in such municipality or township, at least fourteen days before their meeting, of the time and place at which they will consider such application for location; and, after hearing, they shall pass an ordinance refusing such location or extension or granting the same, or any portion thereof, under such lawful restrictions as they may deem the interests of the public require; and the location or extension thus granted shall be deemed and taken to be the true location or extension of the tracks of the railway if an acceptance thereof, in writing, by said directors shall be filed with the secretary of state within thirty days after receiving notice thereof, and a copy thereof delivered to the clerk or other equivalent officer of the municipality or township; and provided, further, that such ordinance shall not be passed or adopted until the company applying for a location of route shall file with the clerk of the board of aldermen or other body to which application is made the written consent of the owners of at least one-half of the property fronting on such portion of the street or highway through which such railway is to be made, which written consent shall be acknowledged by the subscribers thereto as are deeds entitled to be recorded; provided, that the consent as aforesaid of any executor or administrator having power to sell real estate shall be a sufficient consent for the lands which he has such power to sell. If the route thus accepted be shorter than the route designated in the certificate of incorporation, a proportionate part of the moneys paid to the state treasurer upon filing the certificate of incorporation shall be forthwith refunded by the treasurer to said company; but none of such money shall be refunded as aforesaid for any distance in length of route less than half a mile. (As amended by P. L. 1906, p. 683, c. 311.)

9. When company may begin to build road. That no street railway company incorporated under this act shall begin to build its road until it has filed in the office of the secretary of state a certificate signed and sworn to by its president, treasurer and secretary, and a majority of its directors, stating that the full amount of capital stock has been unconditionally subscribed by responsible parties, and that fifty per centum of the par value of each share thereof has been actually paid in cash.

10. When corporate powers shall cease. That if any street railway company incorporated under this act shall not build and put in operation at least one-half of its road within two years after the passage of the ordinance establishing its route by the local authorities, its corporate power shall thereupon cease, and any moneys paid by it to the state treasurer as a guarantee of good faith, under section three of this act, shall be forfeited to the use of the state, excepting such parts thereof as may have been refunded by the treasurer, for portions of the road built; provided, that if any company incorporated under this act shall be restrained, by the order of any court having jurisdiction, from constructing its road or extension, after the route thereof has been duly located,

then the time during which such restraint exists shall not be computed as any portion of the time allowed by this act for the construction and putting into operation of said road. (As amended by P. L. 1889, p. 100, c. 68; G. S., p. 3221.)

11. Extension of location of tracks; amount to be paid to state treasurer. That the board of aldermen, common council or township committee of any municipality or township may, from time to time, under such restrictions as they deem the interests of the public may require, and under the restrictions contained in the eighth section of this act, upon petition, authorize a street railway company, whose tracks have been located, and whose charter has been duly accepted, or its lessees and assigns, to extend the location of its tracks within or into their municipality or township; and such extended location shall be deemed to be the true location of the tracks of the company, if the acceptance thereof, in writing, is filed in the office of the secretary of state within thirty days after the passage of such ordinance; and the said company shall, at the time of such acceptance, file therewith a certificate of the length of such extension, sworn to by the president, treasurer and secretary, and the majority of the directors of said company, and shall, at the same time, pay to the state treasurer the sum of two thousand dollars for each mile of the said extension, and a proportionate sum for each fraction over or under a mile; such moneys shall be refunded to the company, or forfeited to the use of the state, at the times and in the manner provided in the third and tenth sections of this act; and the building of such extension shall not be commenced until the foregoing requirements shall have been complied with. (As amended by P. L. 1890, c. 82, c. 52; G. S., p. 3222.)

12. Company may file amended certificate; payment to state treasurer. That if any street railway company incorporated under this act shall fail to acquire from the board of aldermen, common council, board of commissioners, township committee or other governing body of any municipality or township, within the bounds of which it shall seek the right to construct its road, the right to locate its track or any satisfactory operative portion thereof, as the same shall be described in the certificate of incorporation, it may file an amended certificate of incorporation with the secretary of state, describing a new route, on paying to the state treasurer moneys at the rate of two thousand dollars per mile for any excess of length in the new route over the old one, such moneys to be held and disposed of by the state treasurer in the manner and at the time prescribed by the third and tenth sections of this act; and if the new route shall be shorter than the old, the state treasurer shall forthwith refund to the said company or its treasurer, a proportionate amount of the money so held by him for the said difference in length; provided, such difference shall exceed one-half mile; or the said company may certify to the state treasurer in writing, under the oaths of its president, secretary, treasurer and a majority of the board of directors, the failure of the municipal or township authorities to grant such operative route, and thereupon the state treasurer shall refund to said company the moneys deposited by it with him as aforesaid, and the charter of said company shall thereupon become null and void. (As amended by P. L. 1888, p. 541, c. 335; G. S., p. 3220.)

13. Assessment of subscribers to capital stock. That the directors of any street railway company incorporated hereunder may, from time to time, assess such sums of money, not in excess of their par value, on all the shares of stock subscribed, but not paid up, as they shall think proper, and may direct the same to be paid to the treasurer, who shall give written notice thereof to the subscriber; if the subscriber neglects to pay his assessment for thirty days after such notice, the directors may transfer the rights under such subscription to any person who sub-

scribes the same and pays the assessment due, or may order the treasurer, upon giving notice of the same, to sell such shares by public auction to the highest bidder; if the shares of the subscriber do not sell for a sum sufficient to pay his assessments, with interest and charges of sale, he shall be liable to the corporation for the deficiency; if such shares sell for more, he shall be entitled to the surplus remaining.

14. Issue and transfer of certificates of stock. That no certificate of stock in any street railway company formed under this act shall be issued until the par value thereof is actually paid in cash; the shares are to be transferred by a conveyance in writing, recorded by the secretary or treasurer in books kept in his office; on making the transfer and surrendering the old certificate, a new one shall be granted.

15. Liability of directors. That the directors of every street railway company formed under this act shall be jointly and severally liable, to the extent of its capital stock, for all its debts and contracts until the whole amount of its capital stock, as originally fixed by the articles of incorporation, shall be paid in, and a certificate stating the amount thereof so fixed and paid in shall be signed and sworn to by its president, secretary, treasurer and a majority of its directors, and filed in the office of the secretary of state.

16. Increase of capital stock. That in case the capital stock of any company formed under this act shall be found to be insufficient for constructing and operating this road, such company may, with the concurrence of two-thirds in amount of holdings of all its stockholders, increase its capital stock from time to time to any amount required for the purpose of constructing, maintaining and operating its railroad and extensions; such increase may be sanctioned by a vote in person or by proxy of two-thirds in amount of all the stockholders of the company at a meeting of such stockholders called by the directors of the company for that purpose by a notice in writing to each stockholder, to be served on him personally, or by depositing the same properly folded and directed to him at the post-office nearest his usual place of residence, in the post-office, at least twenty days prior to such meeting; such notice must state the time and place of the meeting and its object, and the amount to which it is proposed to increase the capital stock; the proceedings of such meeting must be entered on the minutes of the proceedings of the company, and thereupon the capital stock of the company may be increased to the amount sanctioned by a vote of two-thirds in amount of all the stockholders in the company.

17. Companies may borrow money and issue bonds. That any company incorporated under this act shall have power to borrow such sums or sum of money from time to time, not to exceed in the whole its capital stock, as shall be necessary to build, construct or repair its road and branches, and furnish all necessary property and equipments for the use and objects of said company, and to secure the payment thereof by the execution, negotiation and sale of any bond or bonds secured by mortgage on its property, appurtenances, privileges and franchises; but no such company shall plead any statute or statutes against usury in any suit or action instituted to enforce payment of any bond or mortgage executed under the provisions of this section; such mortgage, when given shall constitute a lien on all the franchises and property, both real and personal, of the company, and the proceeds of such bond or bonds shall be used only for the purpose of aiding in the construction, repair or equipment of the road, its branches and appurtenances; and upon the diversion of such proceeds from said uses the directors of said company shall become jointly and severally liable for the debts of the company in an amount equal to the sum of money so diverted and misapplied.

18. Companies to keep in repair streets, roads and bridges. That every street railway company incorporated under this act shall keep in repair, to the satisfaction of the local authorities, the paving, upper planking or other surface material of the portions of streets, roads and bridges occupied by its tracks, and if such tracks occupy unpaved streets or roads, shall, in addition, so keep in repair eighteen inches on each side of the portion occupied by its tracks; provided, that nothing in this section shall be deemed to affect or repeal existing provisions of any municipal charter or any ordinance or regulation heretofore passed and adopted.

19. Regulations as to rate of speed and use of tracks. That the board of aldermen, common council or township committee may from time to time establish such reasonable regulations as to the rate of speed, mode of use of the tracks and removal of snow and ice therefrom within their municipality or township as the interest and convenience of the public may require, and may enforce the same by lawful penalties.

20. Penalty for obstructing railroad. That whoever willfully and maliciously obstructs a street railway company incorporated under this act, in the legal use of its railway track, or so delays the passage of the cars thereon or aids in or abets such obstruction, detention or delay, shall be punished by a fine not exceeding fifty dollars or by imprisonment not exceeding ten days.

21. Regulations for use of road, rates of fare. That any street railway company incorporated under this act may from time to time establish regulations for the use of its road, cars and property, and may establish the rate or rates of fare on all passengers and property transported in its cars.

22. Penalties against company, by whom sued for. That all penalties prescribed by this act and incurred by any street railway company incorporated hereunder shall be sued for in its own name and to its own use by the municipality or township in which the act or omission of such company complained of has been committed or suffered.

23. Companies heretofore incorporated may become subject to the provisions of this act. That any street railway company heretofore incorporated, either by special act or under general laws, and now controlling and operating a street railway, may come under and be subject to the provisions of this act, and continue its existence and operation in the same manner as if formed under the same, if such company shall make and execute a certificate under the hands of the president and directors of the company, which certificate shall state that the said company desires to come under the provisions and liabilities of this act, and which shall be duly acknowledged or proved in the manner prescribed for the acknowledgment or proof of conveyances of real property, and shall be filed in the office of the secretary of state; and upon the filing of such certificate as aforesaid, the said company shall be deemed to be duly incorporated under this act to be free from the liabilities and provisions of the act or acts under which it was formerly incorporated; provided, however, that nothing in this section contained shall be held to affect any transaction, liability or debts of any such company, done, accrued or contracted before the filing of said certificate; and provided, further, that if such company filing said certificate shall be at such time as it shall file the same, operating a railway not entirely completed over its designated route, it shall forthwith, and before proceeding further to complete the same, pay to the state treasurer the sum of two thousand dollars per mile and proportionate sums for fractions of a mile, to insure the completion within one year from the date of filing said certificate with the secretary of state of so much of said company's railway the route of which has been lawfully designated but not actually built upon and operated; upon failure to deposit the said security as aforesaid, the

designation of so much of said company's route as shall be unoccupied by its road shall be null and void, whether the same be designated by special statute or otherwise.

24. What companies shall not construct or operate street railway. That no company not organized under a special charter or under this act, or now actually owning, controlling and operating a street railway, shall hereafter construct or operate any street railway or any branch or extension thereof in or on any of the streets or highways of any municipality or township of this state.

A SUPPLEMENT TO AN ACT ENTITLED "AN ACT TO PROVIDE FOR THE INCORPORATION OF STREET RAILWAY COMPANIES AND TO REGULATE THE SAME," APPROVED APRIL SIXTH, ONE THOUSAND EIGHT HUNDRED AND EIGHTY-SIX.¹

1. Act to apply to all avenues, streets and roads laid out by private individuals. That the act to which this is a supplement shall apply to all avenues, streets, roads and alleyways laid out by private individuals in towns or villages, and parts adjacent thereto, which are not under the control of aldermen, town councils or township committees, and where there is any doubt as to such control, and in such cases the signatures of a majority of the property-holders fronting on such avenues, streets, roads or alleyways, attested as provided for in said act, and duly filed in the clerk's office of the county in which such railway is proposed to be laid, shall be a sufficient grant for that purpose; provided, that this shall not apply to avenues, streets, roads or alleyways now controlled by any township, plank road, railway or other corporations, without their consent, as provided in said act.

2. Time when act takes effect. That this act shall take effect immediately.

A SUPPLEMENT TO AN ACT ENTITLED "AN ACT TO PROVIDE FOR THE INCORPORATION OF STREET RAILWAY COMPANIES AND TO REGULATE THE SAME," APPROVED APRIL SIXTH, ONE THOUSAND EIGHT HUNDRED AND EIGHTY-SIX.²

[Sections 1 and 2 amendatory of sections 8 and 10, supra, p. 566].

3. Powers and rights conferred upon companies heretofore organized. That all the powers, rights and privileges conferred by the provisions of this act shall apply to and be enjoyed as well by any street railway company heretofore organized under the act to which this act is a supplement, as by any such company hereafter to be so organized thereunder.

4. Repealer. That all acts or parts of acts, general or special, inconsistent with the provisions of this act, be and the same are hereby repealed.

5. Time when act takes effect. That this act shall take effect immediately.

1—Passed May 4, 1886, P. L. 1886, p. 339, c. 232; G. S., p. 3219.

2—Approved March 27, 1889, P. L. 1889, p. 100, c. 68; G. S., p. 3222.

A FURTHER SUPPLEMENT TO AN ACT ENTITLED "AN ACT TO PROVIDE FOR THE INCORPORATION OF STREET RAILWAY COMPANIES, AND TO REGULATE THE SAME," APPROVED APRIL SIXTH, ONE THOUSAND EIGHT HUNDRED AND EIGHTY-SIX.¹

1. Board of commissioners may grant or refuse location of tracks. That the board of commissioners or other authority having control of the streets and highways in any borough or other municipality in this state, shall have all the powers in relation to the location of the tracks of the railway of any company organized under the act to which this is a supplement or the supplements thereto, as are conferred by said act or supplements upon the board of aldermen or common council of any municipality; and where application for a location of the tracks of its railway or an extension thereof is made by any company to any board, committee or other authority having control of the streets and highways in any borough or township, such board, committee or other authority shall consider said application and grant or refuse the location or extension petitioned for, or any portion thereof, by a motion or resolution duly passed for this purpose; provided, such location or extension shall in no case be granted unless the company applying therefor shall have made the deposit with the state treasurer required by the act to which this act is a supplement.

2. Repealer. That all acts and parts of acts inconsistent with the provisions of this act be and the same are hereby repealed.

3. Time when act takes effect. That this act shall take effect immediately.

A FURTHER SUPPLEMENT TO AN ACT ENTITLED "AN ACT TO PROVIDE FOR THE INCORPORATION OF STREET RAILWAY COMPANIES AND TO REGULATE THE SAME," APPROVED APRIL SIXTH, ONE THOUSAND EIGHT HUNDRED AND EIGHTY-SIX.²

1. Upon sale of franchise, not less than three purchasers may form a company to maintain and operate street railway and turnpikes. That whenever any company has been organized under the provisions of the act to which this is a supplement, and has constructed and operated its street railway pursuant to the articles of association of such company and the provisions of said act, and has also purchased and operated a turnpike road under the provisions of an act entitled "An act relating to street railways within incorporated towns and boroughs in this state," approved April thirtieth, one thousand eight hundred and eighty-seven, and the street railway, turnpike, franchises and property of such company have been sold and conveyed under and by virtue of a decree of the court of chancery of this state to satisfy any debts of such company, it shall be lawful for the purchasers or owners thereof, not less than three in number to associate themselves together by articles in writing for the purpose of forming a company to maintain and operate such street railway and turnpike.

2. Articles of association and what they shall set forth. That the articles of association shall state the name of the company, the number of years the same is to continue, which shall not be more than fifty years, the points between which said street railway and turnpike have been constructed and operated and are to be maintained and operated, the length of such street railway and turnpike, as near as may be, the name of each municipality, township and county through which said street

1—Approved March 24, 1890, P. L. 1890, p. 113, c. 70; G. S., p. 3222.

2—Passed March 2, 1891, P. L. 1891, p. 64, c. 28; G. S., p. 3223.

railway and turnpike extend, the amount of the capital stock of the company, the number of shares into which said capital stock shall be divided and the names and residences of the directors.

3. Amount of capital stock. That the capital stock of any company to be organized under this act shall be and hereby is fixed and limited as follows: where the street railway, turnpike, franchises and property of any company organized under the act to which this is a supplement have been sold as aforesaid free and clear of all incumbrances, the capital stock of any company to be organized under this act shall not exceed the sum for which such street railway, turnpike, franchises and property were sold, and may be issued as full paid; where such street railway, turnpike, franchises and property have been sold as aforesaid subject to a mortgage indebtedness thereon, the capital stock of any company to be organized under this act shall not exceed the sum for which such railway, turnpike, franchises and property were sold and the sum of such mortgage indebtedness, and may be issued as full paid to the extent of the sum for which such street railway, turnpike, franchises and property were sold, and upon the payment or satisfaction of such mortgage indebtedness, or any part thereof, the residue of such capital stock may be issued as full paid or retained as treasury stock and sold for the benefit of the company; provided, however, that of said residue of said capital stock none shall be at any time issued or sold in excess of the amount which said mortgage indebtedness has been reduced by payment or satisfaction.

4. Articles to be signed by the persons associating themselves. That the said articles of association shall also state the amount of the capital stock of the company, and shall be signed by the persons associating themselves together for the purpose of forming said company, and the signing thereof acknowledged as required in the case of deeds for real estate.

5. Number of directors and term of office. That there shall not be less than three directors of said company, a majority of whom shall be inhabitants of this state; the first board of directors shall be chosen by the persons associating themselves together to form the company, and shall be named in the articles of association; successors to the first board of directors shall be elected by the stockholders of the company at the first annual meeting of the company and annually thereafter; directors shall hold office until the annual meeting next after their appointment or election and until others are chosen and qualified in their stead.

6. Articles to be filed. That the said articles of association, when signed and acknowledged as aforesaid, shall be filed in the office of the secretary of state, and thereupon the persons who shall have subscribed the same, and all persons who may become stockholders of said company, shall be and remain a corporation by the name specified in such articles of association, and shall be vested with all the rights, powers, immunities, privileges and franchises of corporations organized under the act to which this is a supplement, and subject to all the restrictions and conditions imposed upon any corporation organized under said act, except so far as the provisions of said act are modified or changed hereby.

7. Repealer; time when act takes effect. That all acts and parts of acts inconsistent with this act shall be and hereby are repealed, and that this act shall take effect immediately.

A SUPPLEMENT TO AN ACT ENTITLED "AN ACT TO PROVIDE FOR THE INCORPORATION OF STREET RAILWAY COMPANIES, AND TO REGULATE THE SAME," APPROVED APRIL SIXTH, ONE THOUSAND EIGHT HUNDRED AND EIGHTY-SIX, AND THE SEVERAL ACTS AMENDATORY AND SUPPLEMENTARY THERETO.¹

1. Company may lay and operate railway with assent of governing body. That any street railway company, incorporated under any general law of this state, may apply to the board of aldermen or governing body of any city for location of the tracks of its railway therein conformably to the route designated in their articles of incorporation, and with the assent of such board or governing body, shall have power to lay and operate such railway in any of the streets or avenues of said city with such permission; provided, such railway is more than half a mile in length, notwithstanding a street railway may be then constructed and operated within a thousand feet or less of said proposed railway, and notwithstanding that such proposed railway shall be parallel with a street railway within or less than two blocks therefrom, and it shall not be necessary for such company to obtain the written consent of the company then operating such railway within such thousand feet or within two blocks thereof; provided, the terminus of said proposed railway at each end is not within one-half mile of the terminus of any street railway at each end, then constructed and being operated; and provided, further, that not more than one-sixth of said proposed railway shall be constructed parallel to any road already constructed, and then being operated, and not more than one-sixth of any such proposed road shall be allowed to be constructed within less than two blocks of any road then constructed and operated, and in no case shall such proposed road be allowed upon any portion of a street or avenue where a road is now constructed and operated.

2. Repealer; time when act takes effect. That all acts or parts of acts inconsistent with this act be and the same are hereby repealed, and this act shall take effect immediately.

THE TRACTION COMPANY ACT OF 1893.

AN ACT TO AUTHORIZE THE FORMATION OF TRACTION COMPANIES FOR THE CONSTRUCTION AND OPERATION OF STREET RAILWAYS, OR RAILROADS OPERATED AS STREET RAILWAYS, AND TO REGULATE THE SAME.²

1. Organization of corporation; powers of corporation. That it shall and may be lawful for three or more persons, one of whom shall be a resident of the state of New Jersey, to associate themselves into a corporation for the construction and operation of motors, cables and other machinery for supplying motive power to street railways, or other railroads operated as street railways, and the necessary apparatus for applying the same; and such corporation when formed in accordance with the provisions of this act shall have power to enter upon any street, road, lane, alley or other highway upon which any street railway, or other railroad operated as a street railway, is now or may hereafter be constructed (with the consent of the owner or owners, lessee or lessees of such railway or of the person or persons operating the same), and make, construct, apply, maintain and operate such railway, motors, cables, electrical or other devices and appliances, with power to erect, construct,

1—Approved April 16, 1891, P. L. 1891, p. 465, c. 241; G. S., p. 3224.

2—Approved March 14, 1893, P. L. 1893, p. 302, c. 172; G. S., p. 3235.

apply, maintain and use such tunnels, subways, for cables, poles, wire, conduits or other devices for transmitting and using electrical or other forces, as will provide for the traction of cars on street railways, or other railroads operated as street railways, and to construct lines of street or passenger railway, and all necessary turnouts, sidings and bridges on, along, through or over any street, road, lane, alley, stream or highway, either by extension of existing railways or by the building of new lines thereon, either wholly within or partly within or wholly between or partly within and between cities, towns, boroughs, villages, townships and counties, and the same, when constructed, to equip, maintain, use and operate for the carriage of persons and property for compensation to be made such corporation, and to contract with any other person or persons, natural or artificial, for such construction, equipment, maintenance, use or operation, and to purchase, hold, sell, pledge, mortgage or otherwise dispose of any capital stock or securities of any other corporations owning, using, leasing or operating any street railway or other railroad operated as a street railway, turnpike or plank road, or engaged in the construction or equipment thereof, or in creating or supplying power of any kind for the operation thereof, and to exercise all the rights, powers and privileges in respect to such capital stock and securities, incidental to the use and ownership thereof, which any natural person or persons might, could or would do, and to purchase, hold, sell or otherwise dispose of such real or personal property as may be convenient or necessary for the use of the corporations created under this act, and to pledge or mortgage the same with the franchises of such corporations; provided, that no corporation created under this act shall enter upon or use any street, road, lane, alley, or other highway, under color or by virtue of this act, for the extension or construction of new lines of railway, or for the operation thereof, without the consent of the board of aldermen, common council or body having control of streets or highways, or other governing body of the city, town, borough, village, township or county, into or within the limits of which such new line of railways is proposed to be extended, constructed or operated, nor shall any corporation created under this act possess the power to use on any of its railways, within the limits of any street and in the surface thereof, any locomotive or other engine moving on its rails, which is propelled by steam; provided, further, that the adoption of any motor or motive power herein authorized to be used, shall not be deemed to preclude change to any other motor or motive power herein authorized, when and as often as the business of such corporation may from time to time in its judgment so require.

2. That all corporations created under this act shall, in addition to the preceding, possess the following powers, and such other powers as are now, or hereafter may be conferred upon corporations created under the laws of this state which do not possess the general power of condemning lands, or engaging in the business of insurance or banking or deriving profit from the loan or use of money:

I. Limit of existence; seal. To have perpetual succession, by its corporate name, for the period limited in its certificate of incorporation, and to make and use a common seal and alter the same at pleasure;

II. To sue and be sued. To sue and be sued in any court of law or equity;

III. To mortgage property. To mortgage or pledge by way of mortgage, any or all of its property or franchises, or both;

IV. To appoint officers. To appoint such officers and agents as the business of such corporation shall require, upon such suitable compensation as may be agreed;

V. To make by-laws. To make by-laws, not inconsistent with the constitution and laws of this state, or of the United States, for the regulation of the election of its directors, the government of its affairs, the transfer of its stock, and to prescribe and enforce penalties for the breach thereof, not exceeding twenty dollars;

VI. To have other powers. To have all other powers necessary to the performance of its duties and the exercise of its privileges imposed or conferred by this act.

3. That whenever three or more persons shall desire to create themselves and their associates into a corporation under this act, they shall make and file a certificate in writing, to be executed and acknowledged as deeds for the conveyance of lands in this state now are or hereafter may be required to be executed and acknowledged, which certificate shall set forth:

I. Name. The name assumed to designate such company and to be used in its business and dealings;

II. Place of principal office. The place in this state where the principal office of such company is to be located;

III. Amount of capital stock. The total amount of capital stock of such company, which shall not be less than one hundred thousand dollars; the amount with which they shall commence business, which shall not be less than twenty-five thousand dollars; the number of shares into which the said capital stock is divided, and the par value of each share, which last-mentioned sum shall be paid to the treasurer of the state of New Jersey upon filing said certificate, and withdrawn from the treasury as hereinafter provided;

IV. Names and residences of stockholders. The names and residences of the stockholders and the number of shares held by each;

V. Period of existence. The period at which such corporation shall commence and terminate, which shall not exceed one hundred years;

VI. Common or preferred stock. Such provisions relating to common or preferred stock, or limitations upon the exercise of the powers of the corporation, the directors and stockholders, that the parties signing the same desire; provided, such limitations shall not attempt to exempt the corporation, its directors or stockholders from the performance of any duty imposed by law; which certificate, when executed and acknowledged as aforesaid, shall be recorded in the office of the clerk of the county where the principal office of such corporation is to be located, and after being so recorded shall be filed in the office of the secretary of state; the said certificate, or a copy thereof, duly certified by said clerk or secretary, shall be evidence in all courts and places, and upon the execution, acknowledgment, record and the filing thereof, as aforesaid, and the payment of said money to the treasurer of the state as aforesaid, the said persons so associated, their successors and assigns, shall be, from the time of the commencement fixed in the said certificate and until the expiration of the time therein expressed, incorporated into a company by the name mentioned in the said certificate; provided, that the legislature may at any time dissolve any corporation created by this act, or change, alter, modify, repeal or suspend this act at its discretion.

4. Fees upon filing certificate. That upon filing with the secretary of state of this state any certificate of organization or incorporation of any corporation created under this act there shall be paid by the corporation named in such certificate to the secretary of state, for the use of the state, the sum of twenty-five dollars for all corporations having an authorized capital not exceeding one hundred thousand dollars, and the sum of one-fifth of one dollar per thousand upon the largest amount of capital authorized by its certificate of organization or incorporation by

any such corporation having an authorized capital exceeding one hundred thousand dollars.

5. Limit of time for filing certificates. That if any corporation created under this act shall, in the exercise of powers conferred by this act, enter upon any railway for the purpose of operating the same, it shall within ten days thereafter file in the office of the secretary of state a certificate under its corporate seal, attested by its president or other head officer, setting forth the name of the corporation under which such entry shall have been made, the date of such entry and the period of time during which the possession and operation of such railway is to continue, together with a description and map of the route of the railway so entered upon, and in default of the filing of such certificate, description and map as aforesaid, such corporation shall forfeit and pay to the state of New Jersey the sum of one hundred dollars for each day after the expiration of said ten days during which such default shall continue, which sum may be recovered in an action of debt, prosecuted in the name of the state by the attorney general in any court of competent jurisdiction, and the judgment recovered therein shall be a first and paramount lien on all property and assets of such corporation.

6. To file description and map of new line. That whenever any corporation created under this act desires to extend any existing railway or to build any new line of railway, in the exercise of powers conferred by this act, such corporation shall, before beginning the construction of such extension or new line, file in the office of the secretary of state a description of the route of such extension or new line showing the termini of such extension or new line, together with a map exhibiting the same with the courses and distances thereof, and upon filing such description and map such corporation shall thereby secure the exclusive right to build such extension or new line for a period of six months, and thereafter for the additional period of two years, if within said six months such corporation shall have begun in good faith, to construct such extension or new line, and shall have diligently pursued such construction to the completion of such extension or new line within the period of the two years and six months aforesaid, to be computed from the day of the filing of such description and map; provided, however, that such corporation shall have obtained the consent of the board of aldermen, common council, or the body having control of streets and highways or other governing body of any city, town, village, township or county as to the location of the route of such extension or new lines.

7. Location of tracks; notice. That the board of aldermen, common council, or the body having control of streets or highways, or other governing body of any city, town borough, village, township or county, upon the petition of the directors of any company incorporated under this act, or a majority thereof, for a location of the tracks of any extension or new line of its railway conformably to the route designated in description of the route of such extension or new line, and the map exhibiting the same filed as aforesaid in the office of the secretary of state shall give notice to all parties interested by publication in one or more newspapers published and circulated in said municipality, or if none be published there, then by posting in five of the most public places in such municipality or township, at least fourteen days before their meeting, of the time and place at which they will consider such application for location, and after hearing they shall either pass a resolution refusing such location or pass a resolution or ordinance, as may be necessary or proper, granting the said location or any part thereof, under such lawful restrictions as they deem the interests of the public may require, and the location thus granted shall be deemed and taken to be the true location of the tracks of the railway, if an acceptance thereof in writing by said

directors shall be filed with the secretary of state within thirty days after receiving notice thereof, and a copy thereof delivered to the clerk or other equivalent officer of the municipality or township.

8. When to file an amended description. That whenever any corporation organized under this act shall fail to acquire from the board of aldermen, the common council, or the body having control of the streets and highways, or other governing body of any city, town, borough, village, township or county within the limits of which it shall seek to construct its road, the right to locate its track or any satisfactory operative portion thereof, it may file with the secretary of state an amended description of the route of such extension or new line, showing the termini of such extension or new line, together with a map exhibiting the same with the courses and distances thereof, and upon filing such amended description and maps such corporation shall thereby secure the exclusive right to build such extension or new line for a period of six months from the day of the filing of such amended description and map; provided, however, that such corporation shall have obtained the consent of the board of aldermen, common council, or body having control of streets and highways, or other governing body of any city, town, borough, village, township or county, as to location of the route of such amended description of the route of such extension or new line.

9. Proceedings upon filing amended description of route. That the board of aldermen, common council, or the body having control of streets, highways or other governing body of any city, town, borough, village, township or county, upon the petition of the directors of any company incorporated under this act, or a majority thereof, for a location of the tracks of any extension or new line of its railway conformably to the route designated in the amended description of the route of such extension or new line, and the map exhibiting the same filed as aforesaid in the office of the secretary of state, shall give notice to all parties interested by publication in one or more newspapers published and circulated in same municipality, or if none be published there, then by posting in five of the most public places in such municipality or township at least fourteen days before the meeting, of the time and place at which they will consider such application for location in accordance with such amended description, and after hearing they shall either pass a resolution refusing such amended location or pass a resolution or ordinance, as may be necessary or proper, granting the said amended location or any part thereof, under such lawful restrictions as they deem the interests of the public may require, and the location thus granted shall be deemed and taken to be the true location of the tracks of the railway if any acceptance thereof in writing by said directors shall be filed with the secretary of state within thirty days after receiving notice thereof and a copy thereof delivered to the clerk or other equivalent officer of the municipality or township.

10. When lawful to relocate line. That when the location of the route of the extension of any railway or of any new line shall have been made, under the provisions of this act, it shall and may be lawful for the corporation so locating the same, at any time before such extension or new line shall have been completely constructed, to relocate the same or any part thereof, in accordance with the provisions of this act, applicable to the original location thereof, in the same manner and under the same conditions as though the extension or new line, or the part of such extension or new line to be relocated, had never been located.

11. Lawful to use as much of highway as necessary. That it shall and may be lawful for any corporation created under this act, to use, for the purpose of locating, constructing, maintaining and operating any extension of any railway, or any new line of railway, and for the purpose of

erecting, maintaining and using poles, wires, conduits or other devices and appliances for the transmission or application of any motive power, so much of the area of any highway, along which any turnpike or plank road shall be built and in use as shall be necessary for such purposes; provided, that the consent of the corporation owning such turnpike or plank road, or if it be an ordinary highway, that of the board of aldermen, the common council, or the body having control of streets or highways, or other governing body of any city, town, borough, village, township, or county within the limits of which such highway may be situate, shall have been first had or obtained.

12. Retention of certain deposit; repayment. The treasurer of New Jersey shall hold the said sum of twenty-five thousand dollars with which any corporation organized under this act shall commence business, and so paid to the treasurer as hereinbefore provided, subject to be repaid to the directors or treasurer of said company when it shall be proven to his satisfaction that the said company has expended an amount equal to or in excess of twenty-five thousand dollars in the accomplishment of the aims and purposes named in the certificate of incorporation of such company; and in case such company shall not acquire a right to construct a street railroad within one year after the time of depositing said sum of twenty-five thousand dollars as aforesaid, the said treasurer shall, upon being satisfied of that fact, refund the said sum of money to the directors or treasurer of the company, and thereupon all rights of such company to priority of application for location of tracks, if any, shall cease and determine. (As amended by P. L. 1900, p. 479, c. 187.)

13. When lawful to take more lands; limitations. That it shall and may be lawful for any company organized under this act to take so much land or material as may be necessary for the construction of any railway built under the provisions of this act, either as an extension of the line of an existing railway or a new line, not exceeding sixty feet in width, except where a greater amount shall be required for the slopes of cuts and embankments, and such easements in lands lying within or without the limits of any street, road, lane, alley or other highway as may be necessary for the accomplishment of the objects of said company, or such lands or materials as may be required for the purpose of locating and constructing all necessary works, buildings, conveniences and equipments for the construction and operation of such machinery, engines, boilers or appliances, including the erection of poles for the support of wires and conduits or the making tunnels or subways for the production or supply of any of the motive power authorized to be used under this act, and for any of the said purposes to enter at all times upon all lands lying within or without the limits of any street, road, lane, alley or other highway for the purpose of exploring and surveying the same and of locating the right of way thereon and the necessary easements, works, buildings, conveniences, equipments and appliances aforesaid or any of them, doing no unnecessary injury to private or other property; and when the location or locations of such right of way, easements, works, conveniences, equipments and appliances shall have been determined upon and a survey of such location or locations deposited in the office of the secretary of state, then it shall be lawful for every corporation formed under this act upon payment or tender of such compensation as is hereafter provided by its officers, agents, engineers, superintendents, workmen and other persons in their employ, to enter upon, take possession of, hold, have, use and occupy any lands or materials so surveyed, and to do all other things which may be suitable or necessary for use of such land or materials and the enjoyment of said easements or the construction of such right of way, works, buildings, conveniences, equipments and appliances aforesaid, and each and every of them, and

for the maintenance, repair or operation thereof, and of every part thereof; provided, always, that the payment or tender of the payment of all damages for the occupancy of all lands upon which the said right of way, easements, works, buildings, conveniences, equipments and appliances of such company may be located or the use of materials shall be made before the said company, or any person under their direction or employ shall enter upon or break ground in the premises, except for the purpose of surveying and laying out said works, right of way, easements, buildings, conveniences, equipments and appliances and of locating the same, unless the consent of the owner or owners of such lands be first had and obtained.

14. Proceedings when company cannot agree with owner. That when any company incorporated under this act, or its agents, cannot agree with the owner or owners of lands or materials required for any of the purposes aforesaid, or for the use or purchase thereof, or when by the legal incapacity or absence of such owner or owners no such agreement can be made, a particular description of the land or materials so required for the use of such company incorporated under this act for any of the purposes aforesaid, shall be given in writing under oath or affirmation of some engineer or proper agent of the company, and also the name or names of the occupant or occupants, if any there be, and of the owner or owners, if known, and their residence, if the same can be ascertained, to one of the justices of the supreme court of this state, who shall cause any company incorporated under this act to give notice thereof to the persons interested, if known and in this state, or if unknown and out of this state to make publication thereof as he shall direct, for any term not less than ten days, and to assign a particular time and place for the appointment of the commissioners hereinafter named, at which time, upon satisfactory evidence to him of the service or publication of such notice aforesaid, he shall appoint, under his hand and seal, three disinterested, impartial and judicious freholders, residents in the county in which the land in controversy lies or the owner resides, commissioners to examine and appraise the said land required for any of the purposes aforesaid or materials and to assess the damages, upon such notice to be given to the persons interested, as shall be directed by the justice making such appointment, to be expressed therein, not less than ten days; and it shall be the duty of said commissioners (having first taken and subscribed an oath, or affirmation before some person duly authorized to administer an oath, faithfully and impartially to examine the matter in question and to make a true report according to the best of their skill and understanding), to meet at the time and place appointed and to proceed to view and examine the said land or materials, and to make a just and equitable estimate or appraisement of the value of the same, and an assessment of damages to be paid by the company for such lands or materials and damages aforesaid, which report shall be made in writing under the hands and seals of the said commissioners, or any two of them, and filed within ten days thereafter, together with the aforesaid description of the lands or materials and the appointment and oaths or affirmations aforesaid, in the clerk's office of the county in which the land or materials are situate, and after filing said report said commissioners, within not less than fifteen days nor more than thirty days, shall meet at a convenient place in said county to hear and consider objections to said report, and said commissioners shall cause notice of the filing of said report, and of the time and place of said meeting to hear objections to said report, by advertisements under their hands, to be set up in ten public places in said county at least ten days before the time appointed for said meeting, which advertisement shall also be published in at least three newspapers published and circulated in said county at least once a week

for two weeks successively; the first publication of said notice shall be made at least ten days before the time appointed for said meeting; and thereupon said commissioners shall have power to alter and amend their report in any respect they may deem necessary, or as equity and justice may require; and after said commissioners shall have filed their certificate that they do not desire to make any alteration or amendment to their said report, the said company shall apply to a justice of the supreme court to appoint a time and place when and where he will sit to hear a motion to confirm the report of said commissioners, and said justice shall order at least ten days' notice to be given to the time and place appointed for the hearing said motion, which notice shall be posted and published in the same manner as hereinbefore directed for the posting and publishing of the notice of the meeting of said commissioners to hear objections to said report; all objections to the confirmation of said report shall be made in writing and filed in the county clerk's office at least two days before the time appointed to hear said motion; and the said justice having heard the parties interested on such report and the objections thereto, may confirm the said report in all things or refer the same back to said commissioners to be reformed, corrected or amended in such respects as said justice may deem equitable and just, and if the said report of said commissioners be confirmed by said justice, or if, pursuant to the direction of said justice, the same be reformed, corrected or amended as by said commissioners upon filing of said report reformed, corrected or amended as aforesaid, the same shall be taken and considered as confirmed, and remain of record in said clerk's office; and thereupon and on payment or tender of payment of the respective amounts assessed and awarded as herein provided, the said company is hereby empowered to take possession of the lands and easements in said report mentioned required for any of the purposes aforesaid, and to have, hold, use, occupy, possess and enjoy the same for any or all of said purposes; but in case the party or parties entitled to receive any of the respective amounts so awarded shall refuse, upon tender thereof being made, to receive the same, or shall be out of the state, or under any legal disability, or in case there be any doubt as to who is legally entitled to receive any of the respective sums so awarded, then the payment of the respective amounts awarded as aforesaid into the circuit court of the county wherein said report is filed shall be deemed valid and legal payment, and the said report or a copy thereof, certified by the clerk of said county, and proof of the payment or tender of the several amounts so awarded or payment of the same into court as aforesaid, shall at all times be considered as plenary evidence of the right of such company to have, hold, use, occupy, possess and enjoy the said lands for the purposes aforesaid or any of them; and said justice of the supreme court shall, upon application of any party interested, and on such reasonable notice to the others as he may direct, tax and allow such fees and expenses to the justice of the supreme court, commissioners, clerks, and other persons as he shall think equitable and right, which shall be paid by the company.

15. When not liable to pay amount awarded. That in case said company shall within six months after the confirmation of said report, determine not to proceed with the construction of such railway, or shall decide not to use said lands or any part thereof for any of the purposes aforesaid, and file a notice to that effect in the clerk's office of said county, then, and in that case, said company shall not be liable to pay the money awarded to said owner or owners, but only such costs, expenses and reasonable counsel fees as are hereinbefore provided for in the preceding section of this act.

16. May lease property and franchises of other corporations. That any corporation created under this act may lease the property and franchises

of any other corporation owning or operating any street railway or other railroad operated as a street railway, or any turnpike or plank road, or any motor power or traction company, and such other corporation or corporations are hereby authorized to make such lease and after such lease the corporation created under this act may use and operate the franchises and property of such corporation or corporations so leased upon such compensation to be made to the lessee company as such respective lessor corporation may have been entitled to demand from persons using or traveling in or upon the property of such lessor corporation; provided, that all rights of creditors and all liens upon the property of the corporation lessor, and all privileges and immunities of such lessor corporation shall be preserved unimpaired to the same extent as if such lease had not been made; and all debts, liabilities and duties of such lessor corporation shall thenceforth attach to the lessee corporation, and be enforced against or be enjoyed by it to the same extent and in the same manner as they are enforceable against or enjoyed by the lessor corporation; and provided further, that no greater tolls or charges shall be made or demanded by any corporation created under this act than were or are authorized to be charged and collected for the same service by the corporation or corporations, lessor or lessors in said lease.

17. Proceedings when stockholders shall object to making lease. That any stockholder of any company whose property and franchises shall have been leased to a corporation created under this act who shall not assent to lease, or who shall resist or object to the making thereof, may at any time within thirty days after the making of such lease as in this act provided apply by petition to the circuit court of the county in which the chief office of the lessor corporation may be kept or to a judge of said court in vacation, if no such court sits within such period, on reasonable notice to said company, to appoint three disinterested persons to estimate the damage, if any, done to such stockholder by said proposed lease; and whose award, or that of a majority of them, when confirmed by the said court, shall be final and conclusive; and the persons so appointed shall also appraise said stock of such stockholder at the full market value thereof without regard to any depreciation or appreciation in consequence of the said lease; and the lessor company may at its election either pay to the said stockholder the amount of damages so found and awarded, if any, or the value of the stock so ascertained and determined, and upon the payment of the value of the stock as aforesaid, the said stockholder shall transfer the stock so held by him to said lessor company to be disposed of by the directors of said company or to be retained for the benefit of the remaining stockholders; and in case the value of said stock as aforesaid is not so paid within thirty days from the filing of the said award and confirmation by said court, and notice to said lessor company, the damages so found and confirmed shall be a judgment against said company, and collected as other judgments in said court are, by law, recoverable.

18. Corporations may consolidate with any other corporation. That any corporation created under this act may unite and consolidate its stock, property, franchises and railway with those of any other corporation owning or operating any street railway, or railroad operated as a street railway, or any turnpike or plank road, and such consolidated company may continue from time to time to unite and consolidate its stock, property, franchises and railway with those of any other corporation or corporations of this state owning or operating any street railway or railroad operated as a street railway, turnpike or plank road.

19. Conditions of consolidation. That such consolidation or consolidations shall be made under the conditions, provisions, restrictions and

with the powers hereafter in this act mentioned and contained, that is to say:

I. Directors to enter into joint agreement. The directors of the several corporations proposing to consolidate may enter into a joint agreement under the corporate seal of the respective companies for the consolidation of said companies and railways, and prescribing the terms and conditions thereof, the mode of carrying the same into effect, the name of the new corporation, the number and names of the directors and other officers thereof, and who shall be the first directors and officers, and their places of residence, the amount and number of shares of the capital stock, the par value of each share and the manner of converting the capital stock of each of the said companies into the new corporation, and how and when directors and officers shall be chosen, with such other details as they shall deem necessary to perfect such new organization and the consolidation of said companies and railways;

II. Agreement to be submitted to stockholders; proceedings. Said agreement shall be submitted to the stockholders of each of the said companies or corporations at a meeting thereof, called separately, for the purpose of taking the same into consideration; due notice of the time and place of holding such meetings, and the object thereof, shall be delivered to such persons respectively, or sent to them by mail when their post-office address is known to the company, and also, by a general notice published in some newspaper in the city, town or county where such company has its principal office or place of business; and at said meeting of stockholders the agreement of the said directors shall be considered and a vote, by ballot, taken by each company separately, for the adoption or rejection of the same, each share entitling the holder thereof to one vote; and said ballot shall be cast in person or by proxy, and if two-thirds of all the votes of all the stockholders, voting separately, shall be for adoption of said agreement, then that fact shall be certified thereon by the secretary of the respective companies under the seal thereof and a certificate under the seal of the company signed by the secretary and president certifying to the fact of consolidation, the name to be used by such consolidated company under and by virtue of the provisions of this act, and the amount of the authorized capital stock of such consolidated company shall be filed in the office of the secretary of state, and shall from thence be deemed and taken to be evidence of the agreement and act of consolidation of the said companies; and a copy of said certificate duly certified by the secretary of state, under the seal of his office, shall be evidence of the existence of said new corporation.

20. Upon filing certificate deemed one corporation. That upon the making and perfecting the agreement and act of consolidation as aforesaid and filing the said certificate or a copy with the secretary of state as aforesaid, the several corporations parties thereto, with the amount of capital stock set out in said certificate, shall be deemed and taken to be one corporation by the name provided in said agreement and act, possessing within this state all rights, privileges and franchises and subject to all the restrictions, disabilities and duties of each of such corporations so consolidated.

21. When the rights and franchises vest in new corporation. That upon the consummation of said act of consolidation as aforesaid, all and singular the rights, privileges and franchises of each of said corporations parties to the same, and all property, real, personal and mixed, and all debts due on whatever account, as well as stock subscriptions and other things in action belonging to each of such corporations, shall be taken and deemed to be transferred to and vested in such new corpora-

tion without further act or deed; and all property, all rights of way and all and every other interest shall be as effectually the property of the new corporation as they were of the former corporations, parties to said agreement; and the title to real estate, either by deed or otherwise, under the laws of this state vested in either of such corporations shall not be deemed to revert or be in any way impaired by reason of this act; provided, however, that all rights of creditors and all liens upon the property of either of said corporations shall be preserved unimpaired, and the respective corporations may be deemed to continue in existence to preserve the same; and all debts, liabilities and duties of either of said companies shall thenceforth attach to said new corporation and be enforced against it to the same extent as if said debts, liabilities and duties had been incurred or contracted by it.

22. Suits against new company. That suits may be brought and maintained against such company in any of the courts of this state in the same manner as against other railroad companies therein.

23. Proceedings in case of dissenting stockholders. That any stockholder of any company hereby authorized to consolidate with any other, who shall refuse to convert his stock into the stock of the consolidated company, may at any time within thirty days after the adoption of the said agreement of consolidation by the stockholders, as is in this act provided, apply, by petition, to the circuit court of the county in which the chief office of said company may be kept, or to a judge of said court in vacation, if no such court sits within the said period, on reasonable notice to said company, to appoint three disinterested persons to estimate the damage, if any, done to such stockholder by said proposed consolidation, and whose award, or that of a majority of them, when confirmed by the said court, shall be final and conclusive, and the persons so appointed shall also appraise said stock of such stockholder at the full market value thereof, without regard to any depreciation or appreciation in consequence of the said consolidation, and the said company may, at its election, either pay to the said stockholder the amount of damages so found and awarded, if any, or the value of the stock so ascertained and determined, and upon the payment of the value of the stock as aforesaid, the said stockholder shall transfer the stock so held by him to said company, to be disposed of by the directors of said company, or to be retained for the benefit of the remaining stockholders, and in case the value of said stock as aforesaid is not so paid within thirty days from the filing of the said award and confirmation by said court and notice to said company the damages so found and confirmed shall be a judgment against said company, and collected as other judgments in said court are, by law, recoverable.

24. How capital stock may be increased. That the corporation created or consolidated under this act may increase its capital stock to such amount as may be determined by its board of directors; provided, that such corporation shall, previous to the issuing of any such stock, file in the office of the secretary of state of this state a certificate, signed by its president and under its corporate seal, attested by its secretary, setting forth the amount of the proposed increase of capital stock and the number of shares into which the same is to be divided, and also the assent in writing of stockholders owning at least two-thirds in value of the existing capital stock to said proposed increase of capital stock.

25. Consolidated company authorized to issue bonds. That in all cases of consolidation of two or more railway companies under and by virtue of the provisions of this act, the said consolidated company shall have power and authority to issue bonds, registered or with coupons or interest certificates thereto attached, or both, to an amount sufficient to cover all indebtedness of the company so consolidated, and to aid in the com-

pletion and equipment of said railway, to secure the payment of which it shall be lawful for them to create a mortgage covering their corporate franchises, rights, privileges, property, assets, real and personal; provided, that the bonds shall not bear a greater rate of interest than six per centum per annum; the bonds so issued may be given in lieu, exchange and satisfaction of and for all bonds or other debts against the companies thus consolidated, upon such terms as may be agreed upon by and between the holders of said debts or claims.

26. Consolidated company may borrow money, limitations. That in all cases of such consolidation under and by virtue of the provisions of this act that said companies shall have the right to borrow from time to time such sum or sums of money as may be necessary for the accomplishment of the objects of such corporation not exceeding at any one time the total amount of the authorized capital stock of such corporation, and for the repayment thereof may issue bonds registered or with coupons or interest certificates thereto attached, or both, secured by a mortgage or mortgages covering all the corporate franchises, rights, privileges, immunities, assets, real and personal, of such mortgagor corporation.

27. Any corporation may borrow money on bond and mortgage. That any corporation created under this act may borrow from time to time such sum or sums of money as may be necessary for the accomplishment of the objects of such corporation not exceeding at any one time the total amount of the authorized capital stock of such corporation, or any increase thereof, and to secure the repayment thereof, or of any part or portion thereof, may issue bonds registered or with coupons or interest certificates thereto attached, or both, secured by a mortgage of any or all of its franchises, real estate or personal property, including stocks and securities of such corporation or of any other corporation whose stocks or securities it owns, which mortgage may be recorded as mortgages of real estate are or hereafter may be by law required to be recorded in the office of the clerk or register of deeds of the county or counties in which the railway or railways described in said mortgage may be located, and in the office of the clerk or register of deeds of the county in which the principal office of such corporation is situate, and such record or the lodgment of such mortgage in such clerk's or register's office for record shall have the same force, operation and effect as to all judgment creditors, purchasers or mortgagees in good faith, as the record of lodgment for that purpose of mortgages of real estate now have, although such mortgage may not have been executed, proved or recorded as a chattel mortgage.

28. Corporation shall not plead usury. That no corporation or corporations issuing bonds under the provisions of this act shall plead any statute or statutes against usury in any court of law or equity in any suit instituted to enforce the payment of such bonds or mortgages.

29. May issue stock to pay for property. That the directors of any company incorporated under this act may purchase and hold real and personal property necessary and convenient for the business of such company, and also the stocks and securities of other corporations, and issue stock to the amount of the value thereof, in payment therefor, and the stock so issued shall be declared and be taken to be full-paid stock, and shall not be liable to any further call, neither shall the holder thereof be liable for any further payments or assessments upon such stock; and such stocks shall have legibly stamped upon the face thereof, "issued for property purchased," and in all statements and reports of the company to be published, such stock shall not be reported or stated as being issued for cash paid into the company, but shall be reported according to the fact.

30. When limit of time not be computed. That whenever any company incorporated under this act shall have a duty imposed upon it, or a privilege which it is authorized to exercise, and there is a limited time within which such duty is to be discharged or such privilege exercised, and such company may be restrained by the decree, order or writ of any court from the discharge of such duty, or prevented by the omission of any board of aldermen, common council or body having control of streets or highways, or other governing body of any city, town, borough, village, township or county to give any consent required by this act; for the exercise of any privilege conferred by this act, then so much of the time aforesaid during which such restraint exists, or such omission continued, shall not be computed, as any portion of the time limited for the discharge of such duty or the exercise of such privilege.

31. May change gauge of track. That any corporation created under this act, whether by consolidation or otherwise, may change the gauge or width of track of any railway consolidated therewith or leased thereto.

32. Consent given by resolution or ordinance has force of contract. That any consent required by this act to be given by any public body may be given by a resolution or ordinance of such body, which consent, when accepted by any corporation created under this act in a writing under its corporate seal, filed with the clerk of such body, or in the office of the clerk of the county in which such body exists, shall have the force and effect of a contract.

33. Repealer. That all acts and parts of acts inconsistent with this act, to the extent of such inconsistency, be and the same are hereby repealed, and that this act shall take effect immediately.

A SUPPLEMENT TO AN ACT ENTITLED "AN ACT TO AUTHORIZE THE FORMATION OF TRACTION COMPANIES FOR THE CONSTRUCTION AND OPERATION OF STREET RAILWAYS OR RAILROADS OPERATED AS STREET RAILWAYS AND TO REGULATE THE SAME," APPROVED MARCH FOURTEENTH, ONE THOUSAND EIGHT HUNDRED AND NINETY-THREE.¹

1. Merger of adjacent street railways. Whenever a corporation formed under the provisions of the act to which this act is a supplement operating a street railway or street railways in this state shall own at least three-fourths of all the outstanding capital stock of any other corporation of this state owning or operating a street railway or street railways in this state, and the lines of street railways so owned or operated by such corporations shall be adjacent to each other or would if united form one continuous line or system, a merger of the property and franchises of the last-mentioned corporation into those of the first-mentioned corporation may be effected by a unanimous resolution of each of the boards of directors of such corporations; provided, that the holders of every share of the capital stock of the merging corporation not owned by the corporation with which such merger is to be effected shall consent to such resolution in writing.

2. When merger takes effect. Upon filing in the office of the secretary of state a certificate under the seals of such corporations attested by their respective presiding officers, setting forth the said resolution and accompanied by such consent in writing, the corporation whose stock is owned as aforesaid, and to the merger of which consent is so given with all its property, rights and franchises, shall be merged into and transferred to the corporation owning such stock, and thereafter the

¹—Approved March 23, 1900, P. L. 1900, p. 328, c. 138.

separate corporate existence of such merged corporation shall cease and determine (except as hereinafter provided), and all the property, rights and franchises of such merged company shall pass to, and be owned and possessed by, the corporation into which they are thus merged, and shall be enjoyed by it during the period of its corporate existence; provided that all rights of creditors, and all liens upon the property of such merged corporation shall be preserved unimpaired, and such merged corporation may be deemed to continue in existence in order to preserve the same, and all debts, liabilities and duties of such merged corporation shall thenceforth attach to the corporation into which such merger has been made, and may be enforced against it to the same extent as if such debts, liabilities and duties had been incurred or contracted by it; and in every case of such merger the capital stock of the merged corporation shall become void, and the holders thereof shall surrender the same for cancellation.

3. Limit of existence, extension. In case any corporation has been or shall be formed by the consolidation or merger of corporations under the provisions of the act to which this act is supplement, such corporation so formed may file in the office of the secretary of state a certificate under its common seal, attested by the signature of its presiding officer, declaring its desire that the period of its existence shall be limited to the term to be specified therein, not to exceed the period of existence of one of the corporations so consolidated or merged, and thereafter all the rights, privileges and franchises of such corporation and of the several corporations so consolidated or merged, whether acquired by consolidation or merger or otherwise, shall be extended, and shall continue in accordance with such certificate for the term named therein.

4. Time when act takes effect. This act shall take effect immediately.

A SUPPLEMENT TO AN ACT ENTITLED "AN ACT TO AUTHORIZE THE FORMATION OF TRACTION COMPANIES FOR THE CONSTRUCTION AND OPERATION OF STREET RAILWAYS, OR RAILROADS OPERATED AS STREET RAILWAYS, AND TO REGULATE THE SAME," APPROVED MARCH FOURTEENTH, ONE THOUSAND EIGHT HUNDRED AND NINETY-THREE.¹

1. Route may be changed by filing amended map and description. Any company organized under the provisions of the act to which this is a supplement, may at any time change the location of the route of any new line of railway, or any extension of any existing railway, shown on the map thereof filed in the office of secretary of state, or any part of the route of any such new line or extension, by filing an amended map showing such change and alteration of location, in the office of the secretary of state, together with an amended description of the route of such new line or extension, as changed.

2. Acquisition of land for proposed route. It shall be lawful for any company, upon making such change as aforesaid and filing such amended map and description, to acquire by purchase, or by condemnation in the same way and manner as if it had been included in the route before it was so changed, if agreement cannot be made with the owner for the use or purchase thereof, such land or lands or such easements therein as may be necessary for the accomplishment of such change; provided, the said land shall not exceed in width, or the easement therein exceed in extent, that which is now provided for in the act to which this is a supplement.

3. Land to revert to owner. In case such company has acquired by condemnation any land or easement therein along the original route so changed as aforesaid, so much of said land so acquired as aforesaid as

¹—Approved April 9, 1908, P. L. 1908, p. 205, c. 136.

is not within the amended route shall upon the construction of such railway along said amended route revert to the original owners thereof.

4. Consents necessary. Nothing in this act contained shall be construed to allow such company to use any portion of any public street, avenue, park, parkway or other public place, within such amended route without first obtaining consent of abutting property owners and from the proper municipal authorities as now provided by law.

5. Time when act takes effect. This act shall take effect immediately.

A SUPPLEMENT TO AN ACT ENTITLED, "AN ACT TO AUTHORIZE THE FORMATION OF TRACTION COMPANIES FOR THE CONSTRUCTION AND OPERATION OF STREET RAILWAYS, OR RAILROADS OPERATED AS STREET RAILWAYS, AND TO REGULATE THE SAME," APPROVED MARCH FOURTEENTH, ONE THOUSAND EIGHT HUNDRED AND NINETY-THREE.¹

1. How corporation organized. That whenever three or more persons desiring to create themselves into a corporation under the act to which this is a supplement, have made a certificate, in writing, in which it is set forth that such persons have formed themselves into a corporation under said act, and have executed, acknowledged and filed said certificate, and paid to the treasurer of the state of New Jersey the amount with which said company was to commence business as required by the provisions of said act, the said persons, so associated, their successors or assigns, shall, from the time of the commencement fixed in said certificate and until the expiration of the time therein expressed, be incorporated into a company by the name mentioned in said certificate for all the purposes mentioned and set forth in said act, and such corporation shall, from the time of commencement fixed in said certificate, be possessed of all the powers, rights and privileges granted by said act to any corporation organized thereunder.

2. Company to have all powers, rights and privileges without regard to certificate. That whenever any certificate of incorporation or articles of association of any company organized under the provisions of the act to which this is a supplement shall contain a description or designation of a line of railway or the routes or length of the same as proposed to be constructed and operated by said company, such description or designation shall not limit or restrict the powers of such company, but such company shall be possessed of all the powers, rights and privileges granted to all corporations organized under said act, with the same force and effect as if said description or designation had not been inserted in said certificate or articles of association, and any such company having heretofore applied to the proper municipal authority in any city, town, borough, village, township or county in this state, and having been granted a location to build, maintain and operate a railway conformably to the route or routes designated in the description of the route or routes of such railway or extension thereof, and its map or maps exhibiting the same filed in the office of the secretary of state, such company shall have the power and authority to build, maintain and operate a railway, with the necessary appliances therefor, in accordance with the provisions of the act to which this is a supplement, in, along and upon any street or highway in accordance with such location granted as aforesaid, notwithstanding any description, designation or limitation of any line of railway or route or length thereof contained in the certificate of organization or articles of association of such company.

3. Time when act takes effect. That this act shall take effect immediately.

¹—Approved May 16, 1894, P. L. 1894, p. 359, c. 235; G. S., p. 3245.

MISCELLANEOUS ACTS.

AN ACT TO PROVIDE FOR THE BETTER PROTECTION OF THE DRIVERS OF HORSE CARS ON STREET PASSENGER RAILROADS IN THE CITIES AND TOWNS OF THIS STATE.¹

1. Horse car railroads to provide seats for drivers of cars. That hereafter all horse car passenger railroads in the cities and towns of this state shall provide a proper seat upon the front platform of each car, for the use of the driver on such car when driving the same, under reasonable restrictions by the company operating such car as to the use of the said seat in going up or down grade or otherwise.

2. Penalty for failure to comply with requirements. That any such company failing to comply with the requirements of the first section of this act shall be liable to a penalty of twenty-five dollars for each day any car belonging to them shall be in use without such seat, to be recovered in an action of debt before any justice of the peace or district court in the county or city where such railroad may be, by any person suing for the same; one-half of said forfeiture to be paid to the county treasurer of the county where such suit is brought and one-half to the person who shall prosecute the same to effect.

AN ACT TO REGULATE FARES ON HORSE CARS IN CITIES OF THE FIRST CLASS IN THIS STATE.²

1. Horse car fares not to exceed five cents, penalty. That it shall not be lawful for any horse car railroad company, whether organized under general laws or special charter, owning or operating, whether as lessee or otherwise, any horse railroad in cities of the first class in this state to charge or collect more than five cents for each passenger for the whole distance carried, within the limits of any municipal corporation of this state, under penalty of one hundred dollars for each and every offense, to be recovered in an action of debt by any person who may sue for the same in any court of competent jurisdiction, one-half, with the costs of prosecution, to go to the prosecutor, and the other half to the use of the municipal corporation within the limits whereof said offense shall be committed.

2. Repentler. That all acts and parts of acts, general or special, inconsistent with the provisions of this act, be and the same are hereby repealed.

3. Time when act takes effect. That this act shall be a public act, applying to cities of the first class, and shall take effect on the first day of May next.

AN ACT CONCERNING HORSE RAILROADS.³

1. Horse railroad companies may increase capital stock. That it shall be lawful for horse railroad companies, by a vote of a majority (in value) of all the stockholders thereof, to increase their capital stock to any amount not greater than double the number of shares authorized by law

1—Approved March 3, 1882, P. L. 1882, p. 43, c. 40; G. S., p. 3209.

2—Approved March 28, 1882, P. L. 1882, p. 201, c. 141; G. S., p. 3209.

3—Approved March 23, 1883, P. L. 1883, p. 41, c. 197; G. S., p. 3209.

at the time such increase shall be made, and to dispose of the shares representing such increase as their respective boards of directors shall determine to be for the best interests of said company.

2. Statement to be filed in office of secretary of state. That any company availing itself of the provisions of this act shall immediately thereafter file in the office of the secretary of state, under its corporate seal and attested by its president and secretary, a statement setting forth the amount of its capital stock as originally authorized, the amount to which it shall have been increased, and the number of shares representing the increase of capital as authorized by the stockholders.

3. Time when act takes effect. That this act shall take effect immediately.

AN ACT CONCERNING STREET RAILROAD COMPANIES.¹

1. Horse or street railroad companies may increase capital stock. That whenever any horse or street railroad company of this state shall have paid, or shall pay out of its net earnings, from time to time, its mortgage bonds or other funded debt, or shall have applied and used, or shall apply and use, such net earnings for the extension of its road, the laying of additional tracks, or to the purchase of lands for the necessary uses of said company and the improvements thereof, such company may increase its existing authorized capital in an amount equal to the amount paid for, or on account of, any such bonds or other debt, and to the actual cost of any such extension and improvements; and upon making any such increase of its capital stock, such company shall, within three months thereafter, file with the secretary of state a written statement sworn to and subscribed by its president and treasurer, showing the amount of such increase, the amount so paid on account of its bonds or other debt and the costs of said extension and improvements.

2. Authorized to use electric motors or grip cables. That any street or horse railway company in this state may use electric or chemical motors, or grip cables, as the propelling power of its cars, instead of horses; provided, it shall have first obtained the consent of the township committee, or the municipal authorities having charge of the public streets or highways on which it is proposed to use such motors or grip cables, which consent may be granted by ordinance. (As amended by P. L. 1893, p. 241, c. 129).

3. Time when act takes effect. That this act shall take effect immediately.

AN ACT RELATING TO STREET RAILWAYS WITHIN INCORPORATED TOWNS AND BOROUGHES IN THIS STATE.²

1. Companies may construct and operate street railways upon and along turnpike roads. That any street railway company duly organized pursuant to the law may construct and with horses may operate street railways for the transporting of passengers and chattels for hire upon and along such portion of any turnpike road as enters and is located within the limits of any incorporated town or borough in this state, and upon and along such portion of such turnpike as extends outside such limits for the distance of thirteen hundred yards in either direction,

1—Approved March 6, 1886, P. L. 1886, p. 69, c. 53; G. S., pp. 3209, 3210.

2—Approved April 30, 1887, P. L. 1887, p. 240, c. 175; G. S., p. 3224.

after having obtained the consent of the owners of such turnpike so to do; provided, that an ordinance or resolution authorizing the construction of such railway shall have been first passed or adopted by the commissioners of any such town or borough, and that the written consents of not less than two-thirds of all the persons owning lands abutting on such portion of such turnpike in each and every incorporated town or borough shall have been first obtained and filed in the office of the clerk of the county wherein such portion of such turnpike is situate.

2. Turnpike or plank road companies may sell, assign and convey portion of road. That any turnpike or plank company may sell, convey, assign and by written instrument of conveyance transfer and set over to any such street railway company any such portion of any such turnpike or plank road, together with all rights, title and interest to and in such turnpike or plank road, together with all franchises and appurtenances thereto pertaining, including the right to impose and collect tolls thereon, whereof such turnpike or plank road company shall be seized, enfranchised or invested, and any such street railway company may purchase, acquire title to, and hold and enjoy the same, and may become invested and enfranchised with, and may exercise all such franchises and rights, to the same extent, and fully and in similar manner, as theretofore held, enjoyed and exercised by such turnpike or plank road company, and subject to the same penalties and liabilities thereto attached for failure to maintain such road in good condition and repair; provided, that the provisions of this section shall not take effect until the provisions of the first section shall have been fully complied with.

3. Track constructed on road not to obstruct travel on turnpike. That the track and roadbed of any such street railway upon such turnpike road shall be constructed in such manner as shall offer no unnecessary obstruction to travel upon such turnpike, and where any repairs thereto may afterwards become necessary it shall be the duty of such street railway company to make the same without delay, and if not so made, and after five days' notice shall have been given to such company, the commissioners of the town or borough wherein such repairs may be necessary may cause the same to be made at the expense and charge of such street railway company; nothing in this act contained shall apply to any street railway within any city of this state, and the property of such street railway company shall be liable to distraint therefor.

4. Repealer; time when act takes effect. That all laws and parts of laws conflicting herewith, in so far as they conflict herewith, are hereby repealed, and that this act shall take effect immediately.

A SUPPLEMENT TO AN ACT ENTITLED "AN ACT RELATING TO STREET RAILWAYS WITHIN INCORPORATED TOWNS AND BOROUGHS IN THIS STATE." APPROVED APRIL THIRTIETH, ONE THOUSAND EIGHT HUNDRED AND EIGHTY-SEVEN.¹

1. Turnpike companies may construct and operate street railways. That any turnpike company may construct and operate a street railway upon and along the roadbed of such turnpike company; provided, that an ordinance or resolution shall have been first passed by the board of commissioners, common council or other governing body of any city, incorporated town or borough, if any, within or through the limits whereof such turnpike shall lie or extend, authorizing such construction.

1—Passed March 31, 1890, P. L. 1890, p. 166, c. 110; G. S., p. 3225.

2. May obtain additional right of way and acquire lands. That such company may obtain and operate additional right of way for and by their street railway, having been thereto authorized as aforesaid, and may acquire such necessary land by purchase or condemnation, as in and by their original acts of incorporation may have been provided.

3. Repealer; time when act takes effect. That all acts or parts of acts inconsistent herewith be and the same are hereby repealed, and that this act shall take effect immediately.

AN ACT TO AUTHORIZE HORSE RAILROAD COMPANIES INCORPORATED UNDER THE LAWS OF THIS STATE TO MERGE AND CONSOLIDATE THEIR CORPORATE FRANCHISES AND OTHER PROPERTY.¹

1. Horse railroad company may consolidate with other companies. That it shall be lawful for any horse railroad company or corporation organized under the laws of this state to merge and consolidate its capital stock, franchises and property, with those of any other horse railroad company or companies having lines of railway in the same county, which consolidation shall be made under the conditions, provisions, restrictions and with the powers hereafter in this act mentioned and contained, that is to say:

I. Directors may enter into joint agreement for consolidation. The directors of the several corporations proposing to consolidate may enter into a joint agreement, under the corporate seal of the company, for the consolidation of said companies and railroads, and prescribing the terms and conditions thereof, the mode of carrying the same into effect, the name of the new corporation; the number and names of the directors and other officers thereof, and who shall be the first directors and officers, and their places of residence; the number of shares of the capital stock; the amount or par value of each share, and the manner of converting the capital stock of each of the said companies into the new corporation, and how and when directors and officers shall be chosen, with such other details as they shall deem necessary to perfect such new organization and the consolidation of of said companies or railroads;

II. Agreement to be submitted to the stockholders to be filed. Said agreement shall be submitted to the stockholders of each of said companies or corporations at a meeting thereof, called separately, for the purpose of taking the same into consideration; due notice of the time and place of holding such meeting, and the object thereof, shall be delivered to such persons respectively, or sent to them by mail, when their post-office address is known to the company, and also by a general notice published in some newspaper in the city where such company has its principal office or place of business; at said meeting of stockholders the agreement of the said directors shall be considered, and a vote by ballot taken by each company separately, for the adoption or rejection of the same, each share entitling the holder thereof to one vote, and said ballots shall be cast in person or by proxy, and if three-fourths of all the votes of all the stockholders of each company voting separately shall be for adoption of said agreement, then that fact shall be certified thereon by the secretary of the respective companies, under the seal thereof; and the agreement so adopted or a certified copy thereof shall be filed in the office of the secretary of state, and shall, from thence, be deemed and taken to be the agreement and act of consolidation of the said companies; and a copy of said agreement and act of consolidation,

1—Approved February 21, 1888, P. L. 1888, p. 74, c. 48; G. S., p. 3225.

duly certified by the secretary of state, under the seal thereof, shall be evidence of the existence of said new corporation.

2. When agreement perfected and filed be deemed one corporation. That upon making and perfecting the agreement and act of consolidation, as provided in the preceding section, and filing the same or a copy with the secretary of state as aforesaid, the several corporations parties thereto shall be deemed and taken to be one corporation, by the name provided in said agreement and act, possessing all rights, privileges and franchises, and subject to all the restrictions, disabilities and duties of each of such corporations so consolidated; and if there shall be any difference in gauge or width of track of said railroads so consolidated, the same may be changed and harmonized as the board of directors shall prescribe.

3. Consolidation consummated; rights and property vested in new corporation. That upon the consummation of said act of consolidation as aforesaid, all and singular the rights, privileges, and franchises of each of said corporations, parties to the same, and all property, real, personal and mixed, and all debts, due on whatever account, as well as of stock subscriptions, shall be taken and deemed to be transferred to and vested in such new corporation, without further act or deed; and all property, all rights of way, and all and every other interests shall be effectually the property of the new corporation as they were of the former corporations, parties by said agreement, and the title to real estate, either by deed or otherwise under the laws of this state, vested in either of such corporations, shall not be deemed to revert, or be in any way impaired by reason of this act; provided, however, that all rights of creditors and all liens upon the property of either of said corporations shall be preserved unimpaired, and the respective corporations may be deemed to continue in existence to preserve the same; and all debts, liabilities and duties of either of said companies shall thenceforth attach to said new corporation, and be enforced against it to the same extent as if said debts, liabilities and duties had been incurred or contracted by it.

4. Suits against new company. That suits may be brought and maintained against such new company in any of the courts of this state, in the same manner as against other railroad companies therein.

5. Subject to taxation. That such consolidated company and all its real estate and other property shall be subject to taxation and assessed in the manner provided by law for the taxation and assessment of the property of other horse railroad companies.

6. Stockholders, refusing to convert stock into new company, may proceed to have damages estimated. That any stockholder of any company hereby authorized to consolidate with any other, who shall refuse to convert his stock into the stock of the consolidated company may, at any time within thirty days after the adoption of the said agreement of consolidation by the stockholders as in this act provided, apply by petition, to the court of common pleas of the county in which the chief office of said company may be kept, or to a judge of said court in vacation, if no such court sits within said period, on reasonable notice to said company, to appoint three disinterested persons to estimate the damage, if any, done to such stockholder by said proposed consolidation, and whose award or that of a majority of them, when confirmed by the said court, shall be final and conclusive, and the person so appointed shall also appraise said stock of such stockholder at the full market value thereof, without regard to any depreciation or appreciation in consequence of the said consolidation, and the said company may, at its election, either pay to the said stockholder the amount of damages so found and awarded, if any, or the value of the stock so ascertained and determined, and

upon the payment of the value of the stock as aforesaid the said stockholder shall transfer the stock so held by him to said company, or be retained for the benefit of the remaining stockholders; and in case the value of said stock as aforesaid is not so paid within thirty days from the filing of said award and confirmation by said court and notice to said company, the damages so found and confirmed shall be a judgment against said company, and collected as other judgments in said court are by law recoverable.

7. Consolidated company may issue bonds. That in all cases of merger or consolidation of two or more horse railroad companies under and by virtue of the provisions of this act, the said consolidated company shall have power and authority to issue bonds with coupons or interest certificates thereto attached, to an amount sufficient to cover all the indebtedness of the companies so merged and consolidated, and to aid in the completion, reconstruction and better equipment of said railroads, to secure the payment of which it shall be lawful for them to create a mortgage covering their corporate franchises, rights, privileges and property, real and personal, and said mortgage shall be a valid lien, when properly executed and recorded, upon the property described; provided, that the bonds shall not bear a greater rate of interest than six per centum per annum, and the bonds so issued may be given in lieu, exchange and satisfaction of and for all bonds, coupons or other debts or liabilities against the companies thus merged and consolidated, upon such terms as may be agreed upon by and between the holders of said debts or claims and the board of directors of said consolidated company.

8. Time when act takes effect. That this act shall take effect immediately.

AN ACT TO AUTHORIZE STREET RAILWAY COMPANIES INCORPORATED BY OR UNDER THE LAWS OF THIS STATE TO MERGE AND CONSOLIDATE THEIR CORPORATE FRANCHISES AND OTHER PROPERTY.¹

1. Consolidated company subject to taxation. That it shall be lawful for any horse or other street railway company or companies or any company or companies owning or operating a railroad operated as a street railway incorporated by or under laws of this state, to merge and consolidate its corporate franchises and other property with the corporate franchises and other property of any other horse or other street railway company incorporated by or under the laws of this state, which merger and consolidation may be effected in the same manner provided by the statutes of this state for the merger and consolidation of horse railroad companies. (As amended by P. L. 1893, p. 129, c. 69; G. S., p. 3229.)

2. Consolidated company subject to taxation. That such consolidated company and all its real estate, franchises and other property shall be subject to taxation and shall be assessed in the manner provided by law from time to time for the taxation and assessment of the real estate, franchises and other property of horse or other street railway companies in this state.

3. Time when act takes effect. That this act shall take effect immediately.

¹—Approved April 16, 1891, P. L. 1891, p. 455, c. 237; G. S., p. 3229.

AN ACT TO AUTHORIZE STREET RAILWAY COMPANIES, OR COMPANIES OWNING RAILROADS OPERATED AS STREET RAILWAYS TO LEASE THEIR PROPERTY AND FRANCHISES TO ANY OTHER STREET RAILWAY COMPANY, OR RAILROAD COMPANY OPERATED AS A STREET RAILWAY, AND TO AUTHORIZE THE LESSEES TO PROVIDE FOR THE FINANCIAL AND OTHER MANAGEMENT OF THE PROPERTY AND FRANCHISES SO LEASED.¹

1. Companies authorized to lease their property and franchises. That it shall and may be lawful for any company owning any street railway or railways, or any company owning any railroad company operated as a street railway, whether such lessor company or companies are incorporated under any general or special act of this state, to lease their property and franchises to any other street railway company or railroad operated as a street railway created under the laws of this state and such other company or companies are hereby authorized to take such lease for such term or terms, upon such condition or conditions as to the use and operation of the property of the lessor corporation, the enjoyment of privileges of such lessor corporation according to the provisions and restrictions contained in any general act, or in the acts under which said lessor company was incorporated; and the amount of rent to be paid therefor, and the manner of making payment of said rent, and such other conditions, limitations and restrictions as said lessor and lessee corporations may agree upon; provided, that no greater tolls or charges shall be made or demanded by any lessee corporation than were or are authorized to be charged and collected for the same service by the corporation or corporations, lessor or lessors in said lease.

2. Proceedings where any stockholder does not assent to such lease. That any stockholder of any company or companies whose property and franchises shall be leased under the provisions of this act who shall not assent to such lease, or who shall resist or object to the making thereof, may at any time within thirty days after the making of such lease as in this act provided apply by petition to the circuit court of the county in which the chief office if the lessor corporation may be kept, or to a judge of said court in vacation, if no such court sits within such period, on reasonable notice to said company, to appoint three disinterested persons to estimate the damage, if any, done to such stockholder by said proposed lease; and whose award, or that of a majority of them, when confirmed by said court, shall be final and conclusive; and the persons so appointed shall also appraise said stock of such stockholder at the full market value thereof without regard to any depreciation or appreciation in consequence of the said lease; and the said lessor company may, at its election, either pay to the said stockholder the amount of damages so found and awarded, if any, or the value of the stock so ascertained and determined, and upon the payment of the value of the stock as aforesaid the said stockholder shall transfer the stock so held by him to said lessor company to be disposed of by the directors of said company or to be retained for the benefit of the remaining stockholders; and in case the value of said stock as aforesaid is not so paid within thirty days from the filing of said award and confirmation by said court, and notice to said lessor company, the damages so found and confirmed shall be a judgment against said company and collected as other judgments in said court are, by law, recoverable.

3. Lessee may purchase, sell, etc. capital stock of other corporations. That it shall and may be lawful for any corporation or corporations which shall become lessee of any such railroad or railway, under the provisions of this act, to purchase, hold, sell, assign, transfer, mortgage, pledge, or otherwise dispose of the shares of the capital stock, securi-

1—Approved March 8, 1893, P. L. 1893, p. 126, c. 68; G. S., p. 3230.

ties, or other evidences of debt issued or created by any other corporation or corporations organized under the law of this state, and to exercise, while owners of such stock, securities, or other evidences of debt, all the rights, powers and privileges, including the right to vote on such stock, which natural persons, being the owners of such stock, securities, or other evidences of debt, might, could or would exercise.

4. Lessee may increase its capital stock. That any corporation, so becoming a lessee corporation under and by virtue of the provisions of this act, may increase its capital stock to such amount as may be determined by its board of directors; provided, that such corporation shall, previous to issuing of any such stock, file in the office of the secretary of state a certificate, signed by its president and under its corporate seal attested by its secretary, setting forth the amount of the proposed increase of capital stock and the number of shares into which the same is to be divided, and also the assent in writing of stockholders owning at least two-thirds in value of the existing capital stock to said increase of capital stock.

5. Lessee may borrow money and issue bonds. That any corporation so becoming a lessee corporation under and by virtue of the provisions of this act shall have the right to borrow from time to time such sum or sums of money as may be necessary for the financial and other management of the property, not exceeding at any one time the total amount of authorized capital stock of such lessee corporation, and for the repayment thereof may issue bonds registered or with coupons or interest certificates thereto attached or both, secured by a mortgage or mortgages, covering all the corporate franchises, rights, privileges, assets, real and personal, of such mortgagor corporation, including stock and securities of such corporation or in any other corporation whose stock or securities it owns, which mortgage may be recorded as mortgages of real estates are or hereafter may be by law required to be recorded, in the office of the clerk or register of deeds of the county or counties in which the railway or railways described in said mortgage may be located, and in the office of the clerk or register of deeds of the county in which the principal office of such corporation is situate, and such record or the lodgment of such mortgage in such clerk's or register's office for record shall have the same force, operation and effect as to all judgment creditors, purchasers or mortgages in good faith, as the record or lodgment for that purpose of mortgages of real estate now have, although such mortgage may not have been executed, proved or recorded as a chattel mortgage.

6. Shall not plead usury. That no corporation or corporations issuing bonds under the provisions of this act shall plead any statute or statutes against usury in any court of law or equity in any suit instituted to enforce the payment of such bonds or mortgages.

7. Repealer; time when act takes effect. That all acts and parts of acts inconsistent with this act, to the extent of such inconsistency, be and the same are hereby repealed, and that this act shall take effect immediately.

AN ACT TO PROHIBIT THE LAYING OR CONSTRUCTION OF ANY STREET OR HORSE RAILROAD ALONG THE STREETS OF ANY MUNICIPALITY OF THIS STATE WITHOUT THE CONSENT OF THE GOVERNING BODY HAVING THE CONTROL OF THE STREETS IN SUCH MUNICIPALITY.¹

1. Unlawful to lay or construct street or horse railroad without consent of governing body having control of streets, etc. That hereafter it

¹—Approved March 9, 1893, P. L. 1893, p. 144, c. 75; G. S., p. 3231.

shall be unlawful for any street or horse railroad company organized under the act entitled "An act to provide for the incorporation of horse or street railway companies, and to regulate the same," approved April sixth, one thousand eight hundred and eighty-six, or any special or local act authorizing or incorporating any street or horse railroad company, to lay or construct any railroad track or tracks, or any extension of the same through or along any street of any municipality of this state without first obtaining the consent of the common council, board of aldermen, board of public works, or other governing body having the control of the public streets, avenues or roads of said municipality, or along the streets of which municipality said railroad company desires or intends to construct its said railroad.

2. Company may forfeit charter on attempt to construct street railroad without consent of governing body. That if any street or horse railroad company, incorporated under any general or special act, shall construct or attempt to construct any railroad through or upon any street, avenue or road of any municipality of this state without first obtaining the consent of the city council, board of aldermen, board of public works, or other governing body having the control of the streets, avenues or roads of said municipality, it shall be the duty of the attorney-general, upon the application of five residents of any municipality wherein said street or horse railroad company shall construct or attempt to construct said railroad, to apply to the court of chancery for an order to forfeit the charter of said street or horse railroad company, which said court of chancery may upon the application make an order declaring void and of no effect the charter or authority of said railroad company to construct, maintain and operate said railroad, and upon the making and filing of such order the rights of said street or horse railroad company shall be thereupon forfeited and of no force.

3. Repealer; time when act takes effect. That all acts and parts of acts, general, special or local, inconsistent with the provisions of this act, be and the same are hereby repealed, and that this act shall take effect immediately.

A SUPPLEMENT TO AN ACT ENTITLED "AN ACT CONCERNING STREET RAILROAD COMPANIES," APPROVED MARCH SIXTH, ONE THOUSAND EIGHT HUNDRED AND EIGHTY-SIX.¹

1. [Amends section 2 of Act of March 6, 1886, *supra*, p. 589.]

2. Municipal board may authorize use of poles in public streets. That the municipal board, or any county public road board, or other authorities having the charge or control of any streets, highways or avenues in any city, county, town or township of this state, may, when they deem it proper, authorize the use of poles located, or to be located, in the public streets or highways with wires strung thereon for the purpose of supplying the motors with electricity, and when a board grants such authority it may in such case prescribe the manner in which and the places where such poles shall be located, and the manner in which the wires shall be strung thereon, and the same may be authorized and prescribed by ordinance.

3. Consent heretofore granted valid. That any consent heretofore granted, contingent or otherwise, whether by resolution or in any other way by any municipality to any street or horse railway company to use electric or chemical motors or grip cables as the propelling power of its cars, of the construction and character in such ordinance or resolution

1—Approved March 11, 1893, P. L. 1893, p. 241, c. 129; G. S., P. 3210.

specified, or of which the plan of construction has been or may be in any way assented to or approved by such municipal authorities, shall be as valid and effectual as if the same had been granted pursuant to the provisions of this act to the extent authorized by this act; provided, however, that no such consent heretofore granted shall be validated by virtue of anything in this act contained, without the assent and approval of the state board of commissioners of electrical subways first had and obtained.

4. Duties of commissioners not curtailed. That nothing in this act contained shall curtail, abridge or otherwise interfere with any of the powers and duties of the state board of commissioners of electrical subways.

5. Repealer; time when act takes effect. That all acts and parts of acts inconsistent with this act be and the same are hereby repealed, and this act shall take effect immediately.

AN ACT TO ENABLE STREET RAILWAY COMPANIES, OR COMPANIES OWNING RAILROADS OPERATED AS STREET RAILWAYS TO UNITE AND CONSOLIDATE THEIR CORPORATE FRANCHISES AND OTHER PROPERTY WITH THOSE OF TRACTION COMPANIES AND TO PRESCRIBE A METHOD THEREFOR.¹

1. Company authorized to merge and consolidate with motor company. That it shall and may be lawful for any street railway company or other company owning a railroad operated as a street railway, incorporated under any law of this state, to merge and consolidate its property and franchises with those of any motor power company created under any law of this state.

2. Consolidation made under conditions. That said consolidation shall be made under the conditions, provisions, restrictions and with the powers hereafter in this act mentioned and contained, that is to say:

I. Directors may prescribe terms and conditions. The directors of the several corporations proposing to consolidate may enter into a joint agreement, under the corporate seal of the company, for the consolidation of said companies and railways, and prescribing the terms and conditions thereof, the mode of carrying the same into effect, the name of the new corporation, the number and names of the directors and other officers thereof, who shall be the first directors and officers, and their places of residence, the number of shares of the capital stock, the amount or par value of each share and the manner of converting the capital stock of each of the said companies into the new corporation, and how and when directors and officers shall be chosen, with such other details as they shall deem necessary to perfect such new organization and the consolidation of said companies or railways;

II. Agreement submitted to stockholders; procedure. Said agreement shall be submitted to the stockholders of each of said companies or corporations at a meeting thereof, called separately, for the purpose of taking the same into consideration; due notice of the time and place of holding such meeting, and the object thereof, shall be delivered to such persons respectively, or sent to them by mail, when their post-office address is known to the company; and, also, by a general notice published in some newspaper in the city, town or county where such company has its principal office or place of business; and at said meeting of stockholders the agreement of the said directors shall be considered, and a

1—Approved March 14, 1893, P. L. 1893, p. 292, c. 168; G. S., p. 3232.

vote, by ballot, taken by each company separately, for the adoption or rejection of the same, each share entitling the holder thereof to one vote; and said ballots shall be cast in person or by proxy, and if two-thirds of all the votes of all the stockholders, voting separately, shall be for adoption of said agreement, then that the fact shall be certified thereon by the secretary of the respective companies, under the seal thereof; and the agreement so adopted, or a certified copy thereof, shall be filed in the office of the secretary of state, and shall, from thence, be deemed and taken to be the agreement and act of consolidation of the said companies; and a copy of said agreement and act of consolidation, duly certified by the secretary of state, under the seal of his office, shall be evidence of the existence of said new corporation.

3. One corporation upon filing agreement with secretary of state. That upon the making and perfecting the agreement and act of consolidation, as provided in the preceding section, and filing the same, or copy, with the secretary of state as aforesaid, the several corporations, parties thereto, shall be deemed and taken to be one corporation, by the name provided in said agreement and act, possessing within this state all rights, privileges and franchises, and subject to all the restrictions, disabilities and duties of each of such corporations so consolidated.

4. When rights and franchises of each corporation deemed vested in new corporation. That upon the consummation of said act of consolidation as aforesaid, all and singular the rights, privileges and franchises of each of said corporations, parties to the same, and all property, real, personal and mixed, and all debts, due on whatever account, as well as stock subscriptions and other things in action belonging to each of such corporations, shall be taken and deemed to be transferred to and vested in such new corporation without further act or deed; and all property, all rights of way, and all and every other interests shall be effectually the property of the new corporation as they were of the former corporations, parties to said agreement; and the title to real estate, either by deed or otherwise, under the laws of this state vested in either of such corporations shall not be deemed to revert or be in any way impaired by reason of this act; provided, however, that all rights of creditors and all liens upon the property of either of said corporations shall be preserved unimpaired, and the respective corporations may be deemed to continue in existence to preserve the same; and all debts, liabilities and duties of either of said companies shall thenceforth attach to said new corporation and be enforced against it to the same extent as if said debts, liabilities and duties had been incurred or contracted by it.

5. Suits against new company. That suits may be brought and maintained against such new company in any of the courts of this state in the same manner as against other railway companies therein.

6. Proceedings in case of dissenting stockholders. That any stockholder of any company hereby authorized to consolidate with any other, who shall refuse to convert his stock into the stock of the consolidated company, may, at any time within thirty days after the adoption of the said agreement of consolidation by the stockholders as in this act provided, apply, by petition, to the circuit court of the county in which the chief office of said company may be kept, or to a judge of said court in vacation, if no such court sits within said period, on reasonable notice to said company, to appoint three disinterested persons to estimate the damage, if any, done to such stockholder by said proposed consolidation, and whose award, or that of a majority of them, when confirmed by the said court, shall be final and conclusive, and the persons so appointed shall also appraise said stock of such stockholder at the full market value thereof, without regard of any depreciation or appreciation in consequence of the said consolidation, and the said company may, at its

election, either pay to the said stockholder the amount of damages so found and awarded, if any, or the value of the stock, so ascertained and determined, and upon the payment of the value of the stock as aforesaid, the said stockholder shall transfer the stock so held by him to said company, to be disposed of by the directors of said company, or be retained for the benefit of the remaining stockholders; and in case the value of said stock as aforesaid is not so paid within thirty days from the filing of the said award and confirmation by said court, and notice to said company, the damages so found and confirmed shall be a judgment against said company and collected as other judgments in said court are, by law, recoverable.

7. Consolidated company may issue bonds. That in all cases of consolidation of two or more railway companies under and by virtue of the provisions of this act the said consolidated company shall have power and authority to issue bonds registered, or with coupons or interest certificates thereto attached, or both, to an amount sufficient to cover all the indebtedness of the company so merged and consolidated, and to aid in the completion and equipment of said railway, to secure the payment of which it shall be lawful for them to create a mortgage, covering their corporate franchises, rights, privileges and property, real and personal; provided, that the bonds shall not bear a greater rate of interest than six per centum per annum; the bonds so issued may be given in lieu, exchange and satisfaction of and for all bonds or other debts against the companies thus merged and consolidated, upon such terms as may be agreed upon by and between the holders of said debts or claims; provided, that such company shall not plead any statute or statutes against usury, in any court of law or equity, in any suit instituted to enforce the payment of any bond or mortgage executed under any of the provisions of this act.

8. Repealer; time when act takes effect. That all acts and parts of acts inconsistent with this act, to the extent of such inconsistency, be and the same are hereby repealed, and that this act shall take effect immediately.

AN ACT TO AUTHORIZE STREET RAILWAY COMPANIES, OR COMPANIES OWNING RAILROADS OPERATED AS STREET RAILWAYS, TO LEASE THEIR PROPERTY AND FRANCHISES TO TRACTION COMPANIES, AND TO PRESCRIBE A METHOD THEREFOR.¹

1. Company authorized to lease upon conditions as may be agreed upon. That it shall and may be lawful for any company owning any street railway or railways or any company owning any railroad operated as a street railway, whether such lessor company or companies are incorporated under any general or special act of this state, to lease their property and franchises to any traction company created under the laws of this state for such term or terms, upon such condition or conditions as to the use and operation of the property of the corporation, the enjoyment of privileges or immunities of such lessor corporation and the amount of rent to be paid therefor, and the manner of making payment of said rent, and such other conditions, limitations and restrictions as said lessor and lessee corporations may agree upon.

2. Proceedings when stockholder objects to making such lease. That any stockholder of any company or companies whose property and franchises shall be leased under the provisions of this act, who shall not assent to such lease, or who shall resist or object to the making thereof,

¹—Approved March 14, 1893, P. L. 1893, p. 296, c. 169; G. S., p. 3234.

may at any time within thirty days after the making of such lease as in this act provided, apply by petition to the circuit court of the county in which the chief office of the lessor corporation may be kept, or to a judge of said court in vacation if no such court sits within such period, on reasonable notice to said company, to appoint three disinterested persons to estimate the damage, if any, done to such stockholder by said proposed lease, and whose award, or that of a majority of them, when confirmed by the said court shall be final and conclusive; and the persons so appointed shall also appraise said stock of such stockholder at the full market value thereof, without regard to any depreciation or appreciation in consequence of the said lease; and the said lessor company may, at its election, either pay to the said stockholder the amount of damages so found and awarded, if any, or the value of the stock so ascertained and determined, and upon the payment of the value of the stock as aforesaid, the said stockholder shall transfer the stock so held by him to said lessor company, to be disposed of by the directors of said company or to be retained for the benefit of the remaining stockholders; and in case the value of said stock as aforesaid is not so paid within thirty days from the filing of the said award and confirmation by said court, and notice to said lessor company, the damages so found and confirmed shall be a judgment against said company and collected as other judgments in said court are, by law, recoverable.

3. Repealer; time when act takes effect. That all acts and parts of acts inconsistent with this act, to the extent of such inconsistency, be and the same are hereby repealed, and that this act shall take effect immediately.

AN ACT TO AUTHORIZE AND REGULATE THE CONSTRUCTION OF STREET RAILWAYS UPON TURNPIKES.¹

1. May construct road on turnpike in counties of second class. That any duly-incorporated street railway company of this state may construct and operate a street railway upon and along the road-bed of any turnpike company located within counties of the second class in this state, which shall have granted or conveyed such right or privilege to such street railway company.

2. Board of commissioners on petition, to locate track. That the board of commissioners, common council, township committee or other governing body or bodies of any city, incorporated town, borough or township within or through the limits whereof such turnpike shall lie or extend shall, upon the petition of such street railway company and proof of the granting of such permission or right of way by the turnpike company, by resolution or ordinance, locate the track or tracks of such street railway company upon the roadbed of such turnpike company, provided, such governing body may require the surrender by said turnpike company of its toll and other turnpike franchises as a condition upon which such location shall be made.

3. When ordinance or resolution of governing body necessary. That in case said turnpike lies within the boundaries of any incorporated city, town, borough or borough commission in whole or in part, it shall be necessary for such company to be first authorized by ordinance or resolution of the governing body of such city, town, borough or borough commission before the construction of such street railroad within the corporate limits of such city, town, borough or borough commission.

4. Company must conform to the law. That after such location shall have been made as herein provided, such street railway company shall

¹—Approved March 16, 1893, P. L. 1893, p. 342, c. 192; G. S., p. 3246.

in other respects conform to the law concerning horse and street railways.

5. Repealer; time when act takes effect. That all acts or parts of acts inconsistent herewith be and the same are hereby repealed, and that this act shall take effect immediately.

AN ACT TO REGULATE THE CONSTRUCTION AND MAINTENANCE OF STREET RAILROADS IN THIS STATE.¹

1. No railroad to be constructed except by consent of governing body; procedure. That in addition to the provisions or restrictions now required by law, no street railroad shall, from and after the passage of this act, be constructed in, over and upon any street, avenue, highway, land or other public place in any municipality, town, township, village or borough of this state, except upon the consent of the governing body of such municipality, town, township, village or borough, which consent shall only be granted upon a petition of the corporation desiring to construct, operate or maintain a street railroad upon any of the streets, avenues, lanes, highways or public places of such municipality, town, township, village or borough, filed with the clerk thereof, nor shall such permission be granted until public notice of such application shall have been given by publication in one or more newspapers published or circulating in said municipality, town, township, village or borough, to be designated by said governing body, and by posting in five of the most public places in such municipality, town, township, village or borough, for at least fourteen days before the meeting of the governing body thereof at which said application shall be considered, which notice shall specify the name of the corporation presenting such petition, the date of filing the same, the character of the road intended to be constructed, operated or maintained, the motive power to be used thereon, and the street or streets, or other public places through which the same shall extend; that upon the date fixed by such notice, or upon such subsequent date as the hearing of said petition may be adjourned to, by the governing body of such municipality, town, township, village or borough, said municipality, town, township, village or borough may, by ordinance, and not otherwise, grant, or by resolution may refuse permission to construct, maintain or operate such street railroad as prayed for in said petition, or in their discretion may consent to the construction, maintenance or operation of such street railway upon part of the streets, highways or public places designated in such petition or notice, and refuse permission to construct, maintain or operate said street railway upon the remainder of such streets or public places, and the location thus granted by the governing body of such municipality, town, township, village or borough shall be deemed and taken to be the true location of the tracks of said street railway, if an acceptance thereof in writing by the corporation making such petition shall be filed with the secretary of state within thirty days after receiving notice thereof, and a copy thereof delivered to the clerk or other equivalent officer of such municipality, town, township, village or borough; provided, however, that such petition for the designation of route, construction, maintenance or operation of a street railway company shall not be granted by the governing body of any municipality, town, township, village or borough in this state, until there be filed with the clerk of such municipality, town, township, village or borough, or other equivalent officer, the consent in

¹—Approved May 16, 1894, P. L. 1894, p. 374, p. 250; G. S., p. 3247.

writing of the owner or owners of at least one-half in amount in lineal feet of property fronting on such street, highway, avenue or other public place, or upon the part of such street, highway, avenue or other public place through which permission to construct, operate and maintain a street railway is asked, and any such consent may be signed by an attorney in fact thereunto duly authorized and by the executor or trustee of any deceased owner or owners; provided, however, that if any consents have been heretofore obtained to the location of the tracks and the construction and operation of any such railway in, along or upon any street, road or highway in this state, and have been filed with the clerk of any municipality, town, township, village or borough wherein any application by any such railway company is now pending for the necessary consent and permission to locate its tracks and to construct and operate its railway, such consents, under any application made under this act, shall have the same force and effect and be entitled to be considered and counted the same as any consents obtained, given and filed after the passage of this act.

2. Act does not apply to previous grants after work commenced. That the provisions of this act shall not apply to any case in which a location has heretofore been granted, and the work of construction commenced, as provided for under any existing law; and all applications pending shall be proceeded with in conformity with the provisions of this act.

3. Time when act takes effect. That this shall be deemed a public act and shall take effect immediately.

AN ACT RELATING TO STREET RAILWAYS.¹

1. Company may change gauge of tracks. That it shall be lawful for any street railway company which now uses the tracks of another street railway company as a part of its route to change the gauge or width of its tracks to conform to the gauge or width of the tracks of the company whose tracks it so uses as a part of its route.

2. Time when act takes effect. That this act shall take effect immediately.

AN ACT RELATING TO THE CARRYING OF FREIGHT OR EXPRESS MATTER BY COMPANIES OWNING, LEASING OR OPERATING STREET RAILWAYS.²

1. Carrying of freight by street railway companies. It shall not be lawful for any traction or other company or companies owning, leasing or operating street railways or railroads operated as street railways, whose tracks are located upon and run in and along any street or streets, road or roads, of any city, town, borough, village, township or other municipality in this state, to carry over its or their tracks any freight or express matter; provided, however, that this act shall not prevent such companies from carrying supplies for their own use; and provided, however, that this act shall not apply to any such company or companies which may now be lawfully engaged, or has heretofore been lawfully engaged, in the carrying of freight or express matter; and provided further, that this act shall not prevent any such company or companies from carrying freight or express matter in and through any municipality of this state by and with the consent of the governing body of such mu-

1—Approved February 19, 1895, P. L. 1895, p. 92, c. 31; G. S., p. 3248.

2—Approved March 30, 1896, P. L. 1896, p. 208, c. 144. See Act of April 15, 1909, p. 612, below.

nicipality, and under such lawful restrictions and regulations as such governing body may by ordinance impose. (As amended by P. L. 1906, p. 109, c. 77.)

2. Penalty for violation of act. Any corporation or person violating the provisions of this act shall be deemed guilty of a misdemeanor, and on conviction thereof shall, in the case of a corporation, be punished by a fine not exceeding one hundred dollars for each offense, and in case of an individual, in which terms shall be included any officer of a corporation under whose direction or by whose acquiescence or with whose knowledge the offense shall have been committed, shall be punished by a fine not exceeding one hundred dollars, or imprisonment in the county jail not exceeding six months, at the discretion of the court.

3. Repealer. All acts and parts of acts, both general or special, inconsistent with the provisions of this act to be and the same are hereby repealed, and that this act shall take effect immediately.

AN ACT TO REGULATE THE CONSTRUCTION, OPERATION AND MAINTENANCE OF STREET RAILROADS IN THIS STATE.¹

1. No street railroad to be constructed except upon consent of governing bodies of municipalities. No street railroad shall, from and after the passage of this act, be constructed in, over or upon any street, avenue, highway or other public place in any city, town, township, village or borough of this state, except upon the consent of the governing body of such municipality, town, township, village or borough, and such consent shall be granted only upon a petition of the corporation desiring to construct, operate and maintain such street railroad, to be filed with the clerk or other equivalent officer of such municipality, town, township, village or borough; before such permission shall be granted, public notice of the application therefor shall be given by publication in one or more newspapers published or circulating in said city, town, township, village or borough, to be designated by the governing body of such city, town, township, village or borough and by posting in five public places therein, to be likewise designated; such notice to be given at least fourteen days before the meeting of the said governing body at which said application shall be considered; such notice shall specify the name of the corporation presenting such petition, the date of filing the same, the character of the road intended to be constructed, operated or maintained, the motive power to be used thereon, and the street or streets, or other public highways or places through which the same shall extend; that upon the date fixed by such notice, or upon such subsequent date as the hearing of the said matter may be adjourned to by the said governing body may by ordinance, and not otherwise, grant or by resolution may refuse permission to construct, maintain and operate a street railway upon the street or streets, highway or highways or other public place or places named in the said petition, or may, in its discretion, grant permission to the construction, maintenance, and operation of such street railway upon part of the streets, highways, or public places designated in such petition, and refuse permission to construct, maintain, or operate such street railway upon the remainder of such streets or public places; and such permission thus granted, shall be binding and effective, if an acceptance thereof in writing, by the corporation making such petition, shall be filed within thirty days after receiving notice thereof, with the clerk or other equivalent officer of the governing body granting such

1—Approved April 21, 1896, P. L. 1896, p. 329, c. 192.

permission; provided, however, that such permission to construct, maintain and operate a street railway shall in no case be granted, in whole or in part, until there shall be filed with the clerk of such governing body or other equivalent officer, the consent in writing of the owner or owners of at least one-half in amount in lineal feet of property fronting on the streets, highways, avenues and other public places, or upon the part of the street or streets, highway or highways, avenue or avenues, and other public place or places, through or upon which permission to construct, operate and maintain a street railway is asked, and any such consent may be signed by an attorney in fact, thereunto duly authorized by any owner, or by an executor or trustee holding the legal title or having power of sale, which consents shall be executed and acknowledged as are deeds entitled to be recorded; provided, however, that if any consents have heretofore been obtained to the construction, operation and maintenance of any such railway in, along or upon any street or streets, road or roads, highway or highways, public place or places in this state, and such consents have been filed as herein directed, such consents, under any application made under this act, shall have the same force and effect and be considered and counted the same as consents given and filed after the passage of this act; whenever consent and permission has been obtained for the construction, operation and maintenance of any street railway, as hereinbefore provided, such consent and permission shall be deemed and held to include the right to construct, erect, use and maintain such poles, wires, conduits and other structures and appliances as shall be appropriate or necessary to operate such street railway with the power designated in the petition therefor; every application made, as aforesaid, for the construction, operation and maintenance of a street railway shall be accompanied with a map or description of the route of the said railway, showing also the proposed location of rails or tracks and the location of poles or conduits; and the said governing body to whom application is made may, either at the time of giving its permission, as aforesaid, or at a subsequent time, fix and determine by resolution the location of the rails or tracks of such street railway in the streets, highways and public places in which the construction, operation and maintenance of such street railway is granted, and may, in like manner, determine the place or places in which poles shall be located and conduits constructed.

2. Permission and authority to change motive power; how obtained. Any street railroad company owning, operating or controlling a street railroad in this state, desiring to change the motive power used thereon, may obtain permission and authority to do so on application by petition to the said governing body upon notice and hearing as specified in section one for permission to construct and operate; such petition shall designate the motive power which such company desires to use, and the consent of such governing body to the use of such motive power shall be held to include the right to construct, maintain or use, within the lines of the said public streets or highways, such poles, wires, conduits and other structures and appliances as shall be necessary and appropriate to operate such street railroad with the power designated in such petition; and such governing body may, at the time of giving its construct (consent) to such change of motive power, or subsequently, designate by resolution the place or places where poles shall be located or conduits constructed, if the same shall be necessary or proper for operating such street railroad by means of the motive power mentioned in the petition; provided, however, that no further permission to change the motive power shall be necessary where the authority to change has heretofore been conferred, but in every such case the location of poles or conduits shall be made in the manner herein provided; provided, however, that if

any board, body or public authority, other than the governing body of such municipality, town, township, village or borough, shall have control of any of the streets and highways in and over which such proposed street railroad is to be constructed, or in and over which the tracks of such company are located, the consent of such other board, body or public authority shall also be required before such corporation shall have the right to construct, operate or maintain such street railroad or to change the motive power used thereon, which consent shall be granted only upon notice to be given in the same manner as is herein provided for in respect to the notice to be given of application to the governing body of such municipality.

3. Repealer. All acts and parts of acts inconsistent with the provisions of this act be and the same are hereby repealed, and that this act shall take effect immediately.

AN ACT RELATING TO STREET RAILROADS.¹

Whereas, numerous horse and street railroad companies, and companies owning or operating street railroads organized under general and special laws of this state, have, during the past seven years, constructed, reconstructed and extended their lines of street railroad, and have equipped the same for operation by electricity by means of the overhead or trolley system, consisting of poles located on or near the curb lines of streets and within the lines of public highways, and wires and appurtenances suspended from such poles, and other such companies are now constructing or are about to construct, reconstruct, extend and equip their street railroads in the manner aforesaid, and large sums of money have been expended and are about to be expended in such construction, reconstruction and equipment in reliance on the statutes and proceeding of different municipalities in pursuance thereof purporting to authorize the same; and whereas, doubts have been expressed as to the true meaning and intention of the acts and parts of acts of the legislature and the effect of such proceedings purporting to authorize horse or street railroad companies, and companies owning or operating street railroads organized as aforesaid, to equip and operate by electricity the street railroad owned or operated by them in the manner aforesaid; therefore,

1. Proceedings legal and binding. All proceedings heretofore had and taken by the several municipalities in which the tracks of said company are located, purporting to authorize the construction, reconstruction or extension of street railroads or equipment of the same for operation by electricity in the manner aforesaid, and the work done and to be done in pursuance thereof, shall be taken and regarded as legal and binding; provided, that this act shall not apply to any case where the consent of the municipality or public authority in which such tracks and equipment are located when required has not been or shall not be given, either by ordinance or resolution, or when the consent of the owners of that part of the lineal feet of land fronting on the streets or highways on which such tracks are or shall be laid, required when the same were or shall be laid or equipment furnished, has not been or shall not be obtained; and further provided, that nothing in this act shall be construed to apply to or validate any ordinance, resolution or other proceeding now involved in any litigation.

2. Time when act takes effect. This act shall take effect immediately.

1—Approved May 12, 1896, P. L. 1896, p. 346, c. 204.

AN ACT RELATING TO STREET RAILWAY COMPANIES, AND COMPANIES ORGANIZED AS SUCH.¹

1. May extend lines through and along streets. Any street railway company, created and organized under any law of this state, now owning and operating a street railway, may extend the lines of its railways through and along any street, avenue or highway in any municipality of this state, subject, however, to all the provisions, restrictions, and conditions of the general laws of this state relating to street railways and to the obtaining of the consent of property owners and the granting of the consent of the municipal authorities of the municipality within which it is proposed to make such extension.

2. Companies deemed and taken as street railway companies. Any company incorporated as a street railway company or attempted to be so incorporated, under the act entitled "An act to authorize the formation of railroad corporations and to regulate the same," approved April second, eighteen hundred and seventy-three, and the supplements thereto, prior to the passage of the act entitled "An act to provide for the formation of street railway companies and to regulate the same," approved April sixth, eighteen hundred and eighty-six, which prior to the passage of the last-mentioned act had actually constructed and had in operation a street railway, shall be deemed and taken to be a street railway company duly incorporated as such, and all rights and franchises heretofore granted any company so incorporated by the municipal authorities of the municipality within which such railway was constructed and operated shall be valid and effectual; and all the general laws of this state relating to street railways shall be deemed and taken to apply to and govern companies so incorporated.

3. Time when act takes effect. This act shall take effect immediately.

AN ACT FOR THE BETTER REGULATION OF THE OPERATION OF STREET RAILWAYS OR RAILROADS, OR OTHER RAILROADS OPERATED AS STREET RAILWAYS.²

1. Electric cars must have enclosed platforms. On and after the first day of November, one thousand eight hundred and ninety-seven, it shall not be lawful for any company operating a street railway or railroad, or other railroad operated as a street railway, by means of electric motors, to use upon its said railroad or railway any car, motor or vehicle for the conveyance of passengers, between the first day of November and the first day of April in any year, unless said car, motor or other vehicle shall be constructed with enclosed or vestibuled platforms, provided with proper glazed sashes at the ends of the car and with open doorways at the sides.

2. Penalty for violation. For each day, or part of day, any such car, motor or other vehicle for the conveyance of passengers shall be operated and used in the operation of any street railroad or railway operated by means of electric motors, the company owning or operating said car, motor or vehicle shall be liable to a penalty of twenty-five dollars, to be recovered in any court of competent jurisdiction, together with the costs of suit, by the person, board or other authority having by law control of the police department of any municipality in which or through which said car, motor or vehicle shall be operated; the said penalty, when recovered, to be paid into the treasury of said municipality the same as

1—Approved May 12, 1896, P. L. 1896, p. 357, c. 211.

2—Approved May 11, 1897, P. L. 1897, p. 373, c. 190.

the penalties collected for infraction of other police regulations of said municipalities.

AN ACT TO AUTHORIZE BOARDS OF CHOSEN FREEHOLDERS TO WIDEN, STRAIGHTEN, GRADE AND OTHERWISE IMPROVE HIGHWAYS UNDER THEIR CONTROL, AND TO PROVIDE FOR THE CONSTRUCTION OF STREET RAILROADS THEREON.¹

1. Freeholders to have charge of roads; acquisition of land; commissioners. [Omitted.]

2. Construction of street railroad; propositions; bond. That whenever such board intends to widen, straighten, change the grade or location or otherwise improve any public highway under its control, or part thereof, in order to provide for the construction, and convenient operation of a street railroad thereon, that fact shall be stated in a resolution passed by the board, after filing said map, and published for at least two weeks, once a week, in two or more newspapers published in the county, and said resolution shall further state that at a time and place mentioned therein, and at least two weeks after the passage thereof, propositions to construct, maintain and operate a street railroad on the highway to be improved will be received and considered by the board, and all parties interested therein may be heard, or at some later date to which the board may adjourn; each proposition submitted in pursuance of such notice shall state (1) whether the party making the same intends to construct a single or double track street railroad, and if a single track road, the length and location of sidings and switches; (2) the motive power to be used; (3) the rate of fare to be charged; (4) the amount of money to be contributed for defraying the cost of improving the public highway, as proposed by said board, and the amount or percentage of receipts to be paid annually for the franchise, and (5) such other terms as the party making such proposition may be willing to agree to; and if any proposition to construct, maintain and operate a street railroad on such highways to be improved shall be accepted by said board, the party making the same shall forthwith give a bond to said board, conditioned for the faithful performance of such proposition in all respects; such bond to be approved as to form, amount and sufficiency of surety by the justice of the supreme court holding the circuit court in the county before any money shall be expended or obligation incurred in making the proposed improvement; provided, that no arrangement or agreement made by or between the person or corporation making such proposition and the board of chosen freeholders in respect of taxation shall be taken or construed to have the force of contract; nor shall any franchise be granted under this act for a longer term than seventy-five years; and provided further, that such board may reject any or all propositions, and re-advertise from time to time for other propositions, and proceed thereon as in the first instance; but nothing in this act shall be construed to authorize the construction of a street railroad on any public highway on which it is not lawful at present to authorize the construction of a street railroad; nor shall any street railroad be constructed on any public highway, or part of any highway, under the control of such board in any municipality until there shall be filed in the office of the clerk of the county the consent in writing of the owner or owners of at least one-half in amount of lineal feet of property in such municipality fronting on such highway, or upon the part thereof on which it is proposed to construct such street railroad, and any such consent may be signed by

¹—Approved June 13, 1898, P. L. 1898, p. 461, c. 199.

an attorney in fact thereunto duly authorized by the owner or any executor or trustee holding the legal title or having power of sale, which consent shall be executed and acknowledged as is required in case of deeds entitled to be recorded; and in case such consents are not obtained and filed within six months after the acceptance of such proposition, then such proposition and acceptance thereof and bond shall be null and void, and the board of freeholders may give notice calling for other propositions and proceed thereon in the manner aforesaid.

3. Assent by ordinance. Forthwith after the approval of such bond, a copy of such proposition, certified by the clerk of the board of chosen freeholders, shall be delivered to the chairman or other presiding officer of the council, committee or other governing body of every municipality in the county through or into which it is proposed to construct a street railroad on such highway, and the work of constructing such street railroad shall not be commenced or carried on in any municipality in the county until the governing body thereof shall by ordinance assent thereto.

AN ACT TO SECURE TO ANY PLANK ROAD COMPANY, WHOSE CHARTER HAS EXPIRED OR SHALL EXPIRE, THE RIGHT TO CONTINUE TO MAINTAIN AND OPERATE ANY STREET RAILWAY OWNED BY IT.¹

1. Plank road company may continue under traction act. Any plank road company, whose charter has expired or may expire, and which owns a railway operated as a street railway, may come under and be subject to the provisions of the act entitled "An act to authorize the formation or traction companies for the construction and operation of railways or railroads operated as street railways, and to regulate the same," approved March fourteenth, one thousand eight hundred and ninety-three, and the several supplements thereto and acts amendatory thereof, and have the power to maintain and operate any street railway so owned, and continue its existence as if formed under the same, if such company or the directors thereof shall make and execute a certificate under the hands of the president and directors of the company, which certificate shall state that the said company desires to come under the provisions and liabilities of the said act, and which certificate shall be duly acknowledged or proved in the manner prescribed for the acknowledgment or proof of conveyance of real estate, and shall be filed in the office of the secretary of state, and upon filing such certificate as aforesaid together with the written assent of all the stockholders of the company, and upon payment of a fee of twenty dollars to said secretary for the use of the state, said company shall be deemed to be duly incorporated under said act, and to be free from the liabilities and provisions of the act or acts under which it was formerly incorporated; provided, however, that nothing in this section shall be held to affect any liability or debt of any such company accrued or contracted before the filing of said certificate.

2. Repealer. All acts or parts of acts inconsistent with this act are hereby repealed.

3. Time when act takes effect. This act shall take effect immediately.

¹—Approved March 22, 1901, P. L. 1901, p. 290, c. 134.

AN ACT TO PROVIDE FOR THE CONTROL AND OPERATION OF ROADS AND BRIDGES OWNED OR CLAIMED TO BE OWNED BY ANY PLANK ROAD COMPANY WHOSE CHARTER HAS EXPIRED OR MAY EXPIRE.¹

[Sections 1 and 2 relate to action by county.]

3. When street railways use bridges; expenses; petition to court. If any such bridge shall be used by any street railway company, it shall be lawful for such railway company to undertake a part of the expense of repairing, rebuilding and building said bridge, and said board or boards of chosen freeholders and said street railway company may enter into an agreement whereby the share of said expense to be borne by said street railway company may be ascertained and settled; and if no such agreement shall be made, it shall be lawful for the board or boards of chosen freeholders, or for said street railway company, to apply by petition to the court of chancery, which court is hereby given jurisdiction to hear the parties in a summary way on such notice as such court may prescribe, and to apportion and determine the part or proportion of said expense to be borne and paid by said street railway company.

4. Time when act takes effect. This act shall take effect immediately.

AN ACT TO SECURE TO COMPANIES INCORPORATED UNDER "AN ACT CONCERNING CORPORATIONS (REVISION OF 1875)," AND THE SUPPLEMENTS THERETO, OWNING AND OPERATING STREET RAILWAYS UPON PUBLIC STREETS, AVENUES OR HIGHWAYS IN THIS STATE, WHOSE ROADS HAVE BEEN PEACEABLY AND CONTINUOUSLY OPERATED FOR TWO YEARS WITHOUT OBJECTION, THE RIGHT TO CONTINUE TO MAINTAIN AND OPERATE THE SAME, AND TO BECOME INCORPORATED UNDER THE ACT ENTITLED "AN ACT TO AUTHORIZE THE FORMATION OF TRACTION COMPANIES FOR THE CONSTRUCTION AND OPERATION OF STREET RAILWAYS OR RAILROADS OPERATED AS STREET RAILWAYS, AND TO REGULATE THE SAME," APPROVED MARCH FOURTEENTH, ONE THOUSAND EIGHT HUNDRED AND NINETY-THREE, AND THE SEVERAL SUPPLEMENTS THERETO AND ACTS AMENDATORY THEREOF.²

1. Consent to continue after two years' operation. The right of any company incorporated under "An act concerning corporations (Revision of one thousand eight hundred and seventy-five)," and the supplements thereto, owning and operating a street railway upon any of the public streets, avenues or highways of this state to continue to maintain and operate the same shall not be questioned after the lapse of two years' continuous peaceable operation of its railway, with the consent of the municipal authorities expressed by ordinance and without objection, in writing, on the part of the owners of at least one-half of the property abutting on the line of the railway filed with such municipal authorities before the making and filing of the certificate hereinafter mentioned.

2. May incorporate under traction act. Such company may come under and be subject to the provisions of the act entitled "An act to authorize the formation of traction companies for the construction and operation of street railways, or railroads operated as street railways, and to regulate the same," approved March fourteenth, one thousand eight hundred and ninety-three, and the several supplements thereto and acts amendatory thereof, and have such powers and rights as if originally formed under the same, provided such company shall make and execute a cer-

1—Approved March 22, 1901, P. L. 1901, p. 292, c. 135.

2—Approved March 22, 1901, P. L. 1901, p. 298, c. 141.

tificate under the hands of the president and directors of the company, stating that the company desires to come under such provisions and liabilities, and duly acknowledged or proved in the manner prescribed for the acknowledgment or proof of conveyances of real property, and upon filing of such certificate as aforesaid in the office of the secretary of state, together with the written assent, in person or by proxy of two-thirds in interest of each class of stockholders of the company and upon payment of a fee of twenty dollars to said secretary for the use of the state, the said company shall be deemed to be duly incorporated under the said act and to be free from the liabilities and provisions of the act or acts under which it was formerly incorporated; and provided further, that nothing in this act contained shall be construed or held to affect any debt, contract or agreement heretofore made with any person or municipality by such company, nor to relieve any such company from performing and submitting to any and all legal requirements, conditions and restrictions heretofore imposed upon such company by ordinance or otherwise.

3. Repealer. All acts or parts of acts inconsistent with this act are hereby repealed.

4. Time when act takes effect. This act shall take effect immediately

AN ACT AUTHORIZING AND VALIDATING THE CONSTRUCTION, MAINTENANCE AND OPERATION OF STREET RAILWAYS BY TURNPIKE COMPANIES, ON TURNPIKES AND OTHER HIGHWAYS.¹

1. Car line on turnpike. It shall and may be lawful for any turnpike company owning and operating a turnpike in this state, to construct and maintain upon such turnpike, or any part thereof, and upon streets and highways connecting with said turnpike, or in extension thereof, a street railway, with one or two tracks, of standard gauge, and operate the same by electricity by the overhead trolley system or otherwise; provided, that any company desiring so take advantage of this act shall deposit with the state treasurer the sum of twenty-five thousand dollars, which shall be repaid to said company when it shall be proved to the satisfaction of the state treasurer that said company has expended, or shall have expended, an amount in excess of said sum in the construction of said street railway; and provided further, that said company has obtained or shall obtain the consent in writing of the owners of a majority in lineal feet of the property fronting on said turnpike, street or highway, or part thereof, in each municipality and township wherein said railway has been, or is to be constructed, and filed with the clerk of said municipality or township; and provided further, that said company has obtained or shall obtain the consent by ordinance, of each municipality and township wherein said street railway has been or may be located, to the location and operation thereof.

2. May borrow on bond and mortgage. Said turnpike company shall have the power to borrow, from time to time, such sums of money as may be necessary for the construction and equipment of said street railway, and, to secure the payment thereof, or any part thereof, may issue bonds secured by mortgage on all its franchises, real and personal property, and all such bonds and mortgages heretofore issued for such purposes by such company are hereby validated.

3. Repealer. All acts and parts of acts inconsistent with the provisions of this act are hereby repealed, and this act shall take effect immediately.

¹—Approved March 29, 1904, P. L. 1904, p. 311, c. 173.

AN ACT TO ENABLE STREET RAILWAY COMPANIES, OR COMPANIES OWNING RAILROADS OPERATED AS STREET RAILWAYS, TO BECOME CORPORATIONS TO BE GOVERNED AND CONTROLLED BY THE PROVISIONS OF "AN ACT TO AUTHORIZE THE FORMATION OF TRACTION COMPANIES FOR THE CONSTRUCTION AND OPERATION OF STREET RAILWAYS OR RAILROADS OPERATED AS STREET RAILWAYS, AND TO REGULATE THE SAME," APPROVED MARCH FOURTEENTH, ONE THOUSAND EIGHT HUNDRED AND NINETY-THREE, AND TO PRESCRIBE A METHOD THEREFOR.¹

1. Enabling street railway companies to come under traction act. It shall and may be lawful for any street railway company or other company owning a railroad now legally operated as a street railway, incorporated under any law of this state, to become a corporation whose property and franchise shall be governed and controlled, and which shall become possessed of the rights and privileges and subject to the duties prescribed by the provisions of "An act to authorize the formation of traction companies for the construction and operation of street railways or railroads operated as street railways, and to regulate the same," approved March fourteenth, one thousand eight hundred and ninety-three.

2. Procedure. Whenever the directors of any street railway company, or other company owning a railroad operated as a street railway, shall deem it for the best interests of the company that it become a corporation to be governed, controlled and operated by and under the provisions of "An act to authorize the formation of traction companies for the construction and operation of street railways or railroads operated as street railways, and to regulate the same," approved March fourteenth, one thousand eight hundred and ninety-three, it shall be lawful for such directors to call a meeting of the stockholders for the purpose of submitting such object to them for their consideration; due notice of the time and place of holding such meeting, and the object thereof, shall be delivered to such stockholders respectively, or sent to them by mail when their postoffice address is known to the company; and, also, by a general notice published in some newspaper, in the city, town or county where such company has its principal office or place of business; and at said meeting of stockholders, the purpose of changing the government and control of the company from the laws pertaining to street railway companies, to the laws controlling the property, rights, privileges and franchises of companies organized under "An act to authorize the formation of traction companies for the construction and operation of street railways or railroads operated as street railways, and to regulate the same," approved March fourteenth, one thousand eight hundred and ninety-three, shall be considered, and a vote by ballot shall be taken thereon; said ballots shall be cast in person or by proxy, and if two-thirds in value of all the outstanding shares of stock of said company shall be in favor of such change, it shall then be lawful for the directors of such company to make a certificate in writing, under its corporate seal, signed by its president and attested by its secretary, setting forth the action of the company, and that it is the purpose of said company to become a corporation under the provisions of "An act to authorize the formation of traction companies for the construction and operation of street railways or railroads operated as street railways, and to regulate the same," approved March fourteenth, one thousand eight hundred and ninety-three, naming its directors and other officers and the date of their election and term for which they were elected severally; the number of shares of capital stock, the amount or par value of each share, and how and when directors and officers shall be chosen after the expiration of the term of

¹—Approved April 5, 1904, P. L. 1904, p. 426, c. 243.

those in office at the time of making the certificate, with such other details, if any, as they shall deem necessary to perfect such corporation, and bring it within the terms and provisions of "An act to authorize the formation of traction companies for the construction and operation of street railways or railroads operated as street railways, and to regulate the same," approved March fourteenth, one thousand eight hundred and ninety-three.

3. Governed by traction act. Upon the making and filing of the certificate mentioned in the preceding section, in the office of the secretary of state, said company shall from thenceforth cease to be governed, controlled and operated by and under the law under which it was originally incorporated, and shall to all intents and purposes become and be thereafter considered as a corporation organized by and under "An act to authorize the formation of traction companies for the construction and operation of street railways or railroads operated as street railways, and to regulate the same," approved March fourteenth, one thousand eight hundred and ninety-three, and shall be in all things governed and controlled thereby, and shall be authorized and empowered to continue its business, and build, extend, construct, repair and operate its road, and entitled to all the rights, powers, privileges and franchises, as if originally incorporated thereunder; provided, that nothing herein shall operate to grant to any such corporation any franchise or privilege to maintain or build a trolley road in any street or highway, or to revive or renew any such franchise or privilege without the consent of the municipal or other board or boards having control of such streets or highways, granted and approved in the manner required by law at the time of giving such consent.

4. Capital stock not affected; suits. The capital stock of said company shall in no way be affected by such change, unless provision therefor is made in said certificate, and suits may be brought by and against such company for causes arising before as well as after such change.

5. Repealer. All acts and parts of acts inconsistent with this act, to the extent of such inconsistency, be and the same are hereby repealed, and that this act shall take effect immediately.

AN ACT TO AUTHORIZE TRACTION AND OTHER COMPANIES OWNING, LEASING OR OPERATING STREET RAILWAYS TO CARRY FREIGHT AND EXPRESS MATTER THEREON.¹

1. Street car companies may carry freight and express matter. It shall be lawful for any traction company or other company owning, leasing or operating any street railroad in this state to receive and carry over such street railroad freight and express matter for hire and to deliver the same to parties entitled thereto; provided, that it shall not be lawful to transport freight and express matter in any municipality having a population exceeding twelve thousand between the hours of six o'clock A. M. and eleven o'clock P. M., except with the consent and upon such streets as the governing body of such municipality may by ordinance prescribe; and such municipality may prescribe reasonable regulations for the use and operation of cars used in carrying freight and express matter upon the streets of the municipality at all hours; and provided, further, that nothing in this act shall be held to give to any street railway company, traction company or other company owning or operating a street or trolley railway company, whatever the motive power may be,

¹—Approved April 15, 1909, P. L. 1909, p. 156, c. 104.

any perpetual franchise; and provided further, that all rights and privileges hereby granted shall be subject to all the provisions of law with relation to taxation, including franchise taxes, now or hereafter applicable to any street railway company, traction company or other company having the right to use the streets of any municipality under any state or local law or ordinance; and provided further, that nothing in this act shall be deemed to enlarge the provisions of any act which limits the length of time for which franchises may be granted to any street railway company, traction company or other like company; and nothing in this act shall be deemed to restrict or impair the right of the state to alter, modify or repeal this act.

2. Time when act takes effect. This act shall take effect immediately.

AN ACT TO ENABLE ANY CITY OF THIS STATE TO LEASE OR ACQUIRE LANDS AND TO ERECT BUILDINGS THEREON FOR THE COLLECTION OF ASHES AND REFUSE, AND TO CONTRACT WITH STREET RAILWAY COMPANIES FOR THE TRANSPORTATION OF SUCH ASHES AND REFUSE OVER THEIR RAILROAD LINES WITHIN SUCH CITY.¹

1. Cities may contract with trolley companies for removal of ashes and garbage. The board or body of any city of this state having control over the streets and highways of the city shall have the power to enter into contract with any street railway company in such city to carry and transport over its lines within such city ashes and refuse collected therein by the city authorities, or by the contractor for the removal of garbage and ashes in such city, which contract shall be subject to approval by the mayor of such city. And it shall be lawful for any such street railway company entering into contract as aforesaid with any city to run cars upon its railroad lines through the streets thereof for the purpose of carrying and transporting ashes and refuse in accordance with such contract, anything in the laws of this state to the contrary notwithstanding; but such cars shall only be run between the hours of twelve o'clock midnight and six o'clock in the morning of each day.

2. Period of contract. No such contract shall be made or entered into for a longer period than five years; and it shall be the duty of the board or body having control of the finances of the city, when any such contract is made and entered into, to raise and appropriate each year a sum sufficient to pay the amount of money due under such contract for such year.

3. Acquire property for such purposes. The board or body having control of the streets and highways of any city shall have the power, from time to time, to lease or acquire, either by purchase or by condemnation proceedings, lands and real estate, in such part or parts of the city as it shall deem advisable, to be used for the collection of ashes and refuse and for the loading of cars, and thereon to erect suitable sheds and buildings for the purpose. The amount of money estimated by the board or body having control of the streets and highways to be necessary for such purpose for any year shall be certified by such board or body to the board or body having control of the finances of the city, and such board or body shall thereupon include the same in the tax levy for such year, to be raised and collected as other moneys for the annual expenses of such city are raised and collected.

4. Time when act takes effect; repealer. This act shall take effect immediately, and all acts and parts of acts inconsistent herewith are hereby repealed.

1—Approved April 8, 1910, P. L. 1910, p. 221, c. 130.

AN ACT CONCERNING THE RE-LOCATION OF THE TRACKS OF STREET RAILWAY AND TRACTION COMPANIES AND COMPANIES OWNING OR OPERATING STREET RAILWAYS OR TRACTION RAILWAYS IN THIS STATE.¹

1. Time for operating street railway not changed by relocation of tracks. Whenever any street railway or traction company or company owning or operating a street railway or traction railway in this state shall change the location of its tracks, or any part thereof, in any street or public highway to another part of such street or highway, or whenever such street railway or traction company shall change the location of its tracks or any part thereof from a private right of way proposed to be taken for highway purposes to a new location within the lines of a public highway, at the request of the board or boards, body or bodies charged with the maintenance and repair of the street or highway on which such tracks shall be relocated or to which such tracks shall be removed from a private right of way, the company so changing the location of its tracks, and its successors and assigns, shall have the right to maintain and operate the same in the new location for as long a period as it had the right to maintain and operate the tracks in their former location at the time of such re-location.

2. Time when act takes effect. This act shall take effect immediately.

10. TELEGRAPH AND TELEPHONE COMPANIES.

AN ACT TO INCORPORATE AND REGULATE TELEGRAPH COMPANIES (REVISION).²

1. How incorporated. It shall be lawful for three or more persons to associate themselves into a company for the purpose of constructing, owning, using and maintaining a line or lines of electric, telegraph or telephone, or both, wholly within or partly beyond the limits of this state, or for the purpose of owning any interest in any such line or lines, upon executing, recording and filing a certificate, signed in person by all the subscribers to the capital stock named therein, and setting forth the name of the incorporation; the location (town or city, street and number, if number there be) of its principal office in the state; the object or objects for which the corporation is formed; the amount of the total authorized capital stock of the corporation, which shall not be less than two thousand dollars; the number of shares into which the same is divided and the part value of each share; the amount of capital stock with which it will commence business, which shall not be less than one thousand dollars; and, if there be more than one class of stock created by the certificate of incorporation, a description of the different classes, with the terms on which the respective classes of stock are created, the names and post office addresses of the incorporators, and the number of shares subscribed for by each; the aggregate of such subscriptions shall be the amount of capital stock with which the company will commence business, and shall be at least one thousand dollars; and the period, if any, limited for the duration of the company; the certificate of incorporation may also contain any provision which the incorporators may choose to insert for the regulation of the business and for the conduct of the affairs of the corporation, and any provision creating, defining, limiting and regulating the powers of the corporation, the directors and the stockholders, or any class or classes of stockholders; provided, such

1—Approved April 11, 1910, P. L. 1910, p. 400, c. 243.

2—Revision—Approved April 9, 1875; G. S., p. 3457.

provision be not inconsistent with this act; the certificate of incorporation shall be proved or acknowledged as required for deeds of real estate, and recorded in a book to be kept for that purpose in the office of the clerk of the county where the principal office of such corporation in this state shall be established, and, after being so recorded, shall be filed in the office of the secretary of state; said certificate, or a copy thereof, duly certified by the secretary of state, shall be evidence in all courts and places; upon making said certificate and causing the same to be recorded and filed as aforesaid, the persons so associating, their successors and assigns, shall from the date of such filing be and constitute a body corporate by the name set forth in said certificate, to sue and be sued, to purchase and convey such real and personal estate as the purposes of the corporation shall require, with all the powers and privileges contained in the act concerning corporations, so far as the same are necessary or convenient to the attainment of the objects set forth in said certificate, and subject to the provisions, restrictions and liabilities contained in said act, so far as the same are appropriate to and not inconsistent with this act. (As amended by P. L. 1900, p. 74, c. 50.)

2. [Repealed by P. L. 1900, p. 74, c. 50.]

3. Election of officers. Whenever a majority of the incorporators shall call a meeting of the stockholders generally, by a notice, signed by them, designating the time, place and purpose of the meeting, which notice shall be published at least two weeks before the meeting in some newspaper published in the county where the corporation is established, the stockholders, when convened in accordance with said notice shall proceed to elect officers of their said company, consisting of a president, treasurer, secretary, and at least three directors, one-third of whom shall be citizens of this state, whose term of office shall continue one year, or until their successors are chosen and qualified, the respective duties and powers of each of the said officers to be indicated, and determined by the by-laws and regulations of the company; provided, that such by-laws and regulations do not conflict with this act, and are not repugnant to the constitution or laws of this state or of the United States; and that at every election of officers, and at every special, periodical or general meeting of the stockholders, each and every share of stock represented will entitle its representative to one vote; if two days' notice be personally served on all the parties named in the certificate, said first meeting may be called without publication; or if all the parties named in the certificate waive such notice and fix a time of meeting, then no notice or publication shall be required. (As amended by P. L. 1900, p. 74, c. 50.)

4. Rate of charges. That no line of telegraph or company, organized and working under this act, shall be privileged to charge more than twenty-five cents for any message not exceeding ten words in length, and for messages exceeding ten words in length, twenty-five cents for the first ten words, and ten cents for every ten words over the first ten, and at that rate for less than ten to any point in this state; provided, however, the said messages are intended to be transmitted over but one company's line.

5. Taxes. That such companies shall pay one-half of one per centum upon the amount of their capital stock into the state treasury, from the organization thereof respectively.

6. Offices. Any company, organized and working by virtue of this act, shall establish, maintain and keep open at least one office every twenty miles traversed by their line. (As amended by P. L. 1900, p. 74, c. 50.)

7. Injury to telegraph lines punishable. That if any person or persons shall willfully and unlawfully injure, destroy or obstruct the use

of any telegraph line constructed by virtue of this act, such person or persons so offending shall, for the first offense, pay to the said company the sum of one hundred dollars, to be recovered as debts of like amount are by law recoverable, and be liable for all damages, and shall for the second offense, on conviction thereof, be liable to imprisonment in the county jail not to exceed one year.

8. Erection of poles; through lines; approval of plans. Any telegraph company organized under the laws of this or any other state, or of the United States, or any company organized by virtue of this act, shall have full power to erect, construct, lay and maintain the necessary poles, wires, conduits and other fixtures for its lines, in, upon, along, over or under any of the public roads, streets and highways upon first obtaining the consent in writing of the owner of the soil to the erection of any such pole or poles; and through, across or under any of the waters within the limits of this state, and upon, through or over any other land, subject to the right of the owners thereof to full compensation for the same; provided, however, that no pole shall be erected, nor shall any conduit, wire or other fixture be constructed or erected in, upon, along, over or under any of the public roads, streets or highways of any municipality in this state without first obtaining from the governing body of such municipality, permission therefor by ordinance or resolution and a designation therein of the street or streets, road or roads, highway or highways, in, upon, along, over or under which the same shall be erected or constructed; and also a designation in such ordinance or resolution of the manner of placing, erecting or constructing the same and of the particular location in any such road, street or highway where the same shall be placed; and provided further, that the same shall be located and constructed according to a plan or plans showing the location, number and size of any such poles, conduits, or other fixtures, to be approved by such governing body before any such work is begun, and so as in no way to interfere with the safety or convenience of persons or vehicles traveling on or over any such street, road or highway; and provided also, that the use of all public streets, roads or highways in any municipality of this state by any telegraph company, or by any company organized under this act shall be subject to such police and other regulations and restrictions as may be deemed for the best interests of such municipality, and which shall be set forth in an ordinance or ordinances adopted by the governing body thereof; and provided also, that nothing herein contained shall require permission by ordinance or resolution to be obtained from the governing body of any municipality to erect, construct, lay and maintain the necessary poles, wires, conduits and other fixtures which are to be used as a part of a through line or system as distinguished from a local line or system; but for all such through lines or systems, it shall be the duty of such governing body, on written application therefor being made as now required by law, to designate by resolution the street or streets, road or roads, highway or highways in, upon, along over or under which such poles, wires, conduits or other fixtures shall be constructed, laid or erected, and the manner of placing the same, which shall be according to a plan or plans showing the location, number and size of such poles, conduits or other fixtures, to be submitted with said application and approved by such governing body, and the same shall be placed so as in no way to interfere with the safety or convenience of persons or vehicles traveling on or over any such street, road or highway, and subject to such police and other proper regulations and restrictions as may be deemed for the best interests of such municipality to be set forth as aforesaid; and provided also, that such a through line or system as is herein mentioned shall be construed to be one used strictly for through

business and which line or system shall in no event be thereafter used for local business, or in any case as a local line or system, or as a part of any local line or system, without having first obtained permission by ordinance or resolution for such local use or as such a local line or system as hereinbefore provided; and also provided, that where the use of any county road is desired in any county of this state for any local line or system, permission therefor by resolution and a designation therein of such road and of the portion thereof so to be used and of the location and the manner of placing, erecting and constructing such poles, conduits or other fixtures shall first be obtained, in the manner hereinbefore set forth in the case of applications for local lines to the governing bodies of municipalities of the state, from the board of freeholders of such county before any work on such road is begun hereunder, and for any through line or system in, along, upon, over or under any county road, a designation shall be made by the board of freeholders under regulations and restrictions to be set forth as aforesaid and as hereinbefore provided in the case of applications for through lines to the governing bodies of municipalities in this state; and all such work for either a local or a through line, on any county road, shall be done according to a plan or plans showing the location, number and size of any such poles, conduits or other fixtures, to be submitted to and approved by such board of freeholders prior to the beginning of any work thereunder, and under proper police and other regulations and restrictions as aforesaid; and provided also, that where application is made to the governing body of any municipality or county of this state for permission to erect, construct, lay and maintain poles, wires, conduits or other fixtures for any local line or system in such municipality or county, it shall be the duty of such governing body to designate by ordinance or resolution some feasible route in such municipality or county for such local line or system under regulations and restrictions as aforesaid and after a plan or plans have been submitted and approved and otherwise as hereinbefore set forth. (As amended by P. L. 1909, p. 288, c. 195.)

9. Liability of stockholders. That no subscribers to the capital stock of any company organized by virtue of this act shall in any event be responsible for any amount beyond their subscriptions.

10. Application of act. That the foregoing sections of this act shall not apply to any corporations existing or any line or lines in operation on the fifth day of March, one thousand eight hundred and fifty-three.

11. Companies may consolidate. That any telegraph company chartered under the provisions of any act of this state, may connect and consolidate with any other incorporated telegraph company, whether chartered by or existing under a law of this state, or of any other state; and may upon such consolidation, by resolution of its board of directors, change its name, which change of name shall take effect on filing a copy of such resolution, certified under its corporate seal, in the office of the secretary of state of this state; provided, that neither such connection, consolidation or change of name shall affect the obligations or debts of said company, or the process for their enforcement or lien upon its property.

12. Dispatches kept secret. That it shall not be lawful for any person connected with any line of telegraph within this state, whether as superintendent, operator, or in any other capacity whatsoever, to use or cause to be used, or make known or cause to be made known, the contents of any dispatch, of whatsoever nature, which may be sent or received over any line of telegraph in this state, without the consent or direction of either the party sending or receiving the same; and all dispatches which may be filed at any office in this state, for transmission to any point, shall be so transmitted without being made public, or

their purpose in any manner divulged at any intermediate point, on any pretense whatever; and in all respects the same inviolable secrecy, safe keeping and conveyance shall be maintained by the officers and agents employed on the several telegraph lines in this state, in relation to all dispatches which may be sent or received, as is now enjoined by the laws of the United States, in reference to the ordinary mail service, provided, that nothing in this act contained shall be so construed as to prevent the publication, at any point, of any dispatch of a public nature which may be sent by any person or persons with a view to general publicity.

13. Penalty for revealing dispatches. That in case any person, superintendent, operator, or who may in any other capacity be connected with any telegraph line in this state, shall use or cause to be used, or make known or cause to be made known, the contents of any dispatch sent from or received at any office in this state, or in any wise unlawfully expose another's business or secrets, such person, being duly convicted thereof, shall, for every such offense, be subject to a fine of not less than one hundred dollars, or imprisonment not exceeding six months, or both, according to the circumstances of aggravation of the offense.

A SUPPLEMENT TO AN ACT ENTITLED "AN ACT TO INCORPORATE AND REGULATE TELEGRAPH COMPANIES," APPROVED APRIL NINTH, ONE THOUSAND EIGHT HUNDRED AND SEVENTY-FIVE.¹

1. Designation of streets for placing poles. That whenever any telegraph or telephone company, organized by virtue of the act to which this is a supplement, or by virtue of any special act, shall apply to the common council or other legislative body of any incorporated city or town, through which it is intended to construct their telegraph line, for a designation of the streets in which the posts or poles of such company may be erected, it shall be the duty of such common council or legislative body to give to such company a writing, designating the streets in which the posts or poles shall be placed, and the manner of placing the same, subject in other respects to the provisions of the act to which this is a supplement.

2. Proceedings when owner refuses to give right of way. That in case any owner or owners of the soil of any road or highway, on or along which any telegraph or telephone company, organized or incorporated under any law of this state, may desire to erect its poles and place its wires or other fixtures, shall refuse to give his, her or their written consent to such use of said road or highway, where consent is required by law, or where, by reason of the legal incapacity or absence of such owner or owners from this state, or because the names or residences of such owner or owners may be unknown, such consent cannot be obtained, it shall be lawful for such company to present its petition to the circuit court of the county in which said road or highways are situate, or to the judge thereof in vacation, setting forth the privilege or right of way desired or sought to be acquired, the names of the owners of the soil if known, or if not known, or non-resident of the state, that fact shall be stated, and the names of any number of owners or any number of descriptions of the premises desired may be mentioned in one petition, whereupon the said court shall fix the time and place for hearing the matter contained in said petition, and direct notice thereof to be served on the person or persons or corporations interested at least six

¹—Approved March 11, 1880, P. L. 1880, p. 201, c. 151; G. S., p. 3459.

days prior to said hearing, such service to be made in the same manner as writs of summons issued out of said court are served, or, if the owner be unknown or non-resident in this state, such notice shall be published in a newspaper in said county for the like period, or for such longer period as the court may direct, and in case the post-office address of such non-resident owner can be ascertained, a copy of such notice shall be mailed to him or her (postage prepaid) under the direction of said court; at the time mentioned for said hearing the said court (unless good cause to the contrary appear) shall appoint three disinterested freeholders, residents of said county, commissioners to assess and appraise the damages which such owner or owners may sustain by reason of the erection and maintenance of such telegraph or telephone lines; before entering upon such service said commissioners shall severally be sworn faithfully and impartially to perform the duties required by them, and shall, on view, make a just appraisal, in writing, of the damages, if any, sustained by such owner or owners, and file a report thereof in the office of the clerk of said court; if any damages are assessed, the said company shall pay or tender the amount of the same to the party to whom the award is made; if such owner be unknown or cannot be found, they shall pay the same into the said court, and thereupon, or if no damages are found to be sustained, the said company shall have full power to use such road or highway on the line of their route for the purpose of erecting posts or poles on the same to sustain their wires and other fixtures; said commissioners shall receive three dollars for each day's service performed by them, to be paid by said company, and any party aggrieved by the assessment of damages may have the matter determined by a jury; provided, an appeal be made to the said court within thirty days from the time of filing the report by the said commissioners, and said court shall thereupon order a trial by jury, to be conducted as any other case of similar trial; if the jury increase the damages the same and all costs and charges shall be paid by the company, otherwise the costs and charges to be paid by the owner or party interested; and judgment may be entered upon the verdict of said jury and execution issued thereon as in other cases, unless said company shall, within ten days after said verdict is rendered, elect to abandon their proposed route or appropriation of said road or highway by an instrument in writing to that effect, to be filed with the clerk of the said court and entered on the minutes thereof, and as to so much as is thus abandoned the assessment of damages shall be void; provided, that upon such abandonment the costs of all proceedings to be taxed by the said court shall be paid by the company to the opposite party; and provided, also, that all the provisions of this section shall apply to any telegraph or telephone company specially incorporated; and provided further, that nothing in this section contained shall in any wise modify, affect, alter or repeal any of the provisions or requirements of section one of the said act approved March eleventh, eighteen hundred and eighty. (As amended by P. L. 1890, p. 489, c. 298; G. S., p. 3460.)

3. Time when act takes effect. That this act shall take effect immediately.

A SUPPLEMENT TO AN ACT ENTITLED "AN ACT TO INCORPORATE AND REGULATE TELEGRAPH COMPANIES," APPROVED APRIL NINTH, ONE THOUSAND EIGHT HUNDRED AND SEVENTY-FIVE.¹

1. Lines by underground cables. That any telegraph company incorporated under the act to which this is a supplement, desiring to con-

1—Approved March 31, 1882, P. L. 1882; G. S., p. 3459.

struct its lines by means of underground cables containing the wires, instead of poles and posts sustaining the wires, shall be subject to all the restrictions and provisions concerning the use of roads, highways and streets as are provided in the act to which this is a supplement, and any supplements thereto.

2. Time when act takes effect. That this act shall take effect immediately.

A FURTHER SUPPLEMENT TO AN ACT ENTITLED "AN ACT TO INCORPORATE AND REGULATE TELEGRAPH COMPANIES, APPROVED APRIL NINTH, ONE THOUSAND EIGHT HUNDRED AND SEVENTY-FIVE.¹

1. Proceedings for designation of route. That whenever any telegraph or telephone company, organized by virtue of the act to which this is a further supplement, or by virtue of any special act, shall apply to the common council, township committee, or other legislative body of any city, town, township, village or borough in this state (the common council, township committee, or other legislative body of which is authorized by law to take and appropriate lands or real estate for the opening, laying out or constructing streets therein, and to make awards for lands or real estate taken therefor, and to levy assessments for benefits or expenses of such improvements, by a board of assessment, or otherwise), through which it is intended to construct or extend any telegraph or telephone line, for a designation of the street, streets or highways in or upon which the posts or poles of said company may be erected, it shall be the duty of such common council, township committee or other legislative body to give to such company a writing, designating the street, streets or highways in which the posts or poles of said company shall be placed, and the manner of placing the same, subject in other respects to the provisions of the act to which this is a supplement; the street, streets or highways to be designated as aforesaid shall be such as form a practicable and suitable continuous route for the line of said company through such municipality, commencing and ending upon a public highway, and shall be designated with due regard to the improvement of facilities for telegraphic or telephonic communications; in case such common council, township committee, or other legislative body shall not, within fifty days from the time of the making of such application, give to such company a writing designating the street, streets or highways in which the posts or poles of such company may be erected and the manner of placing the same, as hereinbefore provided, it shall be lawful for such company to apply to the circuit court of the county in which such city, town, township, village or borough is situate, or to the judge thereof in vacation, and such court or the judge thereof, after a hearing upon twenty days' notice to such common council, township committee or other legislative body, which notice shall be published at least once a week for two weeks in a newspaper in which the ordinances of such city, town, township, village or borough are published according to law, or in case there is no such official newspaper, then in a newspaper published in the county to be designated by said court or judge, shall as speedily as possible hear the matter in question, and may, in the discretion of said court or judge, designate the street, streets, or highways in which the posts or poles of such company may be erected and the manner of placing the same, which designation shall have the same force and effect as if made by the legislative body of said city, town, township, village or borough. (As amended by P. L. 1888, p. 546, c. 337; G. S., p. 3459.)

1—Approved April 1, 1887, P. L. 1887, p. 119, c. 87.

2. Unlawful to construct without designation. That it shall be unlawful for any telegraph or telephone company to construct or extend any telegraph or telephone line, or to erect any posts or poles therefor in any city, town, township, village or borough having the power enumerated in the first section of this act, without first obtaining such designation of their route, and then only upon the street, streets or highways so to be designated. (As amended by P. L. 1888, p. 546, c. 337; G. S., p. 3640.)

3. Designation made by ordinance. That the designation of such route provided for in the first section of this act shall, in all cases, be made by ordinance where the legislative body of any of the municipal corporations hereinbefore designated are authorized by law to enact ordinances for any purpose whatever.

4. Time when act takes effect. This act shall be deemed a public act and shall take effect immediately.

AN ACT TO AMEND AN ACT ENTITLED "A SUPPLEMENT TO AN ACT ENTITLED 'AN ACT TO INCORPORATE AND REGULATE TELEGRAPH COMPANIES,' APPROVED APRIL NINTH, ONE THOUSAND EIGHT HUNDRED AND SEVENTY-FIVE," WHICH SUPPLEMENTAL ACT WAS APPROVED MARCH ELEVENTH, ONE THOUSAND EIGHT HUNDRED AND EIGHTY, AND TO EXTEND THE PROVISIONS OF SAID ACT, APPROVED APRIL NINTH, ONE THOUSAND EIGHT HUNDRED AND SEVENTY-FIVE, AND ALL SUPPLEMENTS TO SAID LAST-MENTIONED ACT, TO TELEPHONE COMPANIES.¹

1. Amends P. L. 1880, p. 201, § 2, page 618, supra.

2. Provisions extended to telephone companies. That the provisions of the said act entitled "An act to incorporate and regulate telegraph companies," approved April ninth, one thousand eight hundred and seventy-five, and all supplements thereto, be and the same are hereby declared to extend to all telephone companies heretofore organized within this state, in the manner provided in said last-mentioned act for the organization of telegraph companies and the supplements thereto; and telephone companies may be hereafter organized under said act and the supplements thereto and have and exercise all the powers and privileges conferred in and by said last-mentioned act and the supplements thereto upon telegraph companies, and such companies shall be subject and liable to all the provisions of said last-mentioned act and the supplements thereto, in the same manner and to the same extent that telegraph companies are or may be.

3. Time when act takes effect. That this act shall take effect immediately.

SUPPLEMENT TO AN ACT ENTITLED "AN ACT TO INCORPORATE AND REGULATE TELEGRAPH COMPANIES," APPROVED APRIL NINTH, ONE THOUSAND EIGHT HUNDRED AND SEVENTY-FIVE.²

1. Dissolution. Any corporation organized under this act may be dissolved in the manner provided in section thirty-one of the act concerning corporations (Revision of 1896).

1—Approved June 20, 1890, P. L. 1890, p. 489, c. 298; G. S., p. 3461.

2—Approved April 8, 1903, P. L. 1903, p. 363, c. 184.

A SUPPLEMENT TO AN ACT ENTITLED "AN ACT TO AMEND AN ACT ENTITLED 'A SUPPLEMENT TO AN ACT ENTITLED "AN ACT TO INCORPORATE AND REGULATE TELEGRAPH COMPANIES," ' ' ' ' APPROVED APRIL NINTH, ONE THOUSAND EIGHT HUNDRED AND SEVENTY-FIVE, WHICH SUPPLEMENTAL ACT WAS APPROVED MARCH ELEVENTH, ONE THOUSAND EIGHT HUNDRED AND EIGHTY, AND TO EXTEND THE PROVISIONS OF SAID ACT APPROVED APRIL NINTH, ONE THOUSAND EIGHT HUNDRED AND SEVENTY-FIVE, AND ALL SUPPLEMENTS TO SAID LAST-MENTIONED ACT, TO TELEPHONE COMPANIES, APPROVED JUNE TWENTIETH, ONE THOUSAND EIGHT HUNDRED AND NINETY.¹

1. Proposed route may be abandoned. In any case where a report has been heretofore or shall be hereafter made by commissioners appointed on application of any telegraph or telephone company organized or incorporated under any general or special laws of this state, to appraise the damages, if any, sustained by the owner or owners of land by reason of the erection and maintenance of poles and wires on or along any road or highway, such telegraph or telephone company may abandon their proposed route or appropriation of any road or highway or any part thereof, by an instrument in writing to that effect, to be filed with the clerk of the court where such report shall have been filed and entered in the minutes thereof; and as to so much as is thus abandoned the assessment of damages shall be void; provided, that upon such abandonment the costs of all proceedings to be taxed by the said court shall be paid by the company to the opposite party.

A SUPPLEMENT TO AN ACT ENTITLED "AN ACT TO INCORPORATE AND REGULATE TELEGRAPH COMPANIES," APPROVED APRIL NINTH, ONE THOUSAND EIGHT HUNDRED AND SEVENTY-FIVE.²

1. May borrow money and issue bonds; mortgages.—Any corporation organized under and by virtue of the act to which this is a supplement may borrow, from time to time, such sum or sums of money as may be necessary for the accomplishment of the objects of such corporation; and to secure the re-payment thereof, or of any part or portion thereof, may issue bonds registered or with coupons or interest certificates thereto attached, or both, secured by a mortgage of any or all of its franchises, lines of telegraph and telephone, telegraph and telephone exchanges, electrical appliances, rights of way, real estate or personal property, including stock and securities of such corporation or of any other corporation whose stock and securities it owns, which mortgage may be recorded as mortgages of real estate are or hereafter may be by law required to be recorded in the office of the clerk or register of deeds of the county or counties in which the telegraph or telephone lines or telegraph and telephone exchanges may be located, and in the office of the clerk or register of deeds of the county in which the principal office of such corporation is situate, and such record or the lodgment of such mortgage in such clerk's or register's office for record shall be thereafter notice to all subsequent judgment creditors, purchasers and mortgagees of the execution of the said mortgage and of the contents thereof, although such mortgage may not have been executed, proved or recorded as a chattel mortgage.

2. Application of act. That any such mortgage heretofore given by any corporation organized under the act to which this is a supplement,

1—Approved April 11, 1898, P. L. 1898, p. 392, c. 164.

2—Approved March 26, 1903, P. L. 1903, p. 123, c. 86.

and heretofore recorded or registered in the manner prescribed in the preceding section, shall be hereafter notice to all future judgment creditors, purchasers and mortgagees of the execution of the said mortgage and of the contents thereof, although such mortgage may not have been executed, proved or recorded as a chattel mortgage.

SUPPLEMENT TO AN ACT ENTITLED "AN ACT TO INCORPORATE AND REGULATE TELEGRAPH COMPANIES," APPROVED APRIL NINTH, ONE THOUSAND EIGHT HUNDRED AND SEVENTY-FIVE.¹

1. May change certificate of incorporation. Any corporation organized under the provisions of the act to which this is a supplement may increase or decrease its capital stock, change the par value of the shares thereof, change its name, extend its corporate existence, create one or more classes of preferred stock and make such other amendment, change or alteration as may be desired by amendment of its certificate of incorporation in the manner prescribed in section twenty-seven of the "Act concerning corporations" (Revision of 1896) for making such amendments; provided, that the certificate of such amendment, change or alteration required to be filed in the office of the secretary of state shall contain only such provision as it would be lawful and proper to insert in an original certificate of incorporation made at the time of making such amendment; and the certificate of the secretary of state that such certificate and the written consent of stockholders required by law have been filed in his office shall be taken and accepted as evidence of such amendment, change or alteration in all courts and places.

AN ACT RESPECTING TELEGRAPH, TELEPHONE, ELECTRIC LIGHT AND OTHER WIRES AND CABLES FOR ELECTRIC PURPOSES.²

1. No right by prescription. That whenever any wire or cable used for any telegraph, telephone, electric light, or other wire or cable for electric purposes, is or shall be attached to, or does or shall extend upon or over any building or land, no lapse of time whatsoever shall raise a presumption, or justify a prescription of any perpetual right to such attachment or extension.

AN ACT IN RELATION TO OPERATORS AND OTHERS IN THE EMPLOYMENT OF TELEGRAPH COMPANIES IN THIS STATE.³

1. Exemption from militia and jury duty. That the operators and assistant operators, superintendents, managers, linemen and those directly engaged in the business of receiving and forwarding messages by telegraph, shall be exempt from militia duties and serving on juries, and from any fine or penalty for neglect thereof.

1—Approved March 31, 1905, P. L. 1905, p. 180, c. 84.

2—Approved April 21, 1884, P. L. 1884, p. 239, c. 163; G. S., p. 3462.

3—Approved February 27, 1862, P. L. 1862, p. 69; G. S., p. 3456.

11. WATER COMPANIES.

AN ACT FOR THE CONSTRUCTION, MAINTENANCE AND OPERATION OF WATER WORKS FOR THE PURPOSE OF SUPPLYING CITIES, TOWNS, TOWNSHIPS, VILLAGES, BOROUGH AND OTHER MUNICIPALITIES IN THIS STATE WITH WATER. (TITLE AS AMENDED BY P. L. 1906, P. 703, C. 319.)¹

1. Organization of water companies in municipalities not over 15,000. Any number of persons, not less than seven, a majority of whom shall reside in this state, may form a company for the purpose of constructing, maintaining and operating water-works in any city, town, township, village, borough or other municipality of this state having a population of not more than fifteen thousand, and for the purpose of supplying such city, town, township, village, borough or other municipality and the inhabitants thereof with water. (As amended, by P. L. 1880, p. 273, c. 182, P. L. 1883, p. 204, c. 157, P. L. 1884, p. 42, c. 29, P. L. 1895, p. 75, c. 14, P. L. 1905, p. 452, P. L. 1906, p. 703, c. 319, and P. L. 1910, p. 241, c. 141.)

2. How company organized. That such persons desirous of forming a company for such purposes shall make, sign and acknowledge, before some officer authorized to take such acknowledgment of deeds, a certificate in writing, which shall state the corporate name adopted by the company, the amount of the capital stock, the term of its existence, the number of directors, the names of those who shall manage the affairs of the company for the first year, or until their successors are elected and qualified, and the name of the city, town or village in or for which such works are to be constructed and the business of the company carried on; such certificate shall be filed in the office of the secretary of state, together with the consent, in writing, of the corporate authorities, if any, of the town or city proposed to be supplied with water.

3. When incorporation effected. That when such certificate and consent shall have been filed as aforesaid, the persons who shall have signed and acknowledged the same, and their successors, shall be a body politic and corporate, and shall have power, as such, to take and divert any and all such springs and streams of water, and build, erect, alter, repair, enlarge and maintain all such reservoirs and works, and lay down all such pipes and conduits for water, at such times and in such places as shall be necessary and proper to enable said corporation to carry into effect the purposes of its incorporation.

4. May enter upon lands, etc. That it shall be lawful for such corporation to enter upon any and all lands in the neighborhood of the village, town or city, which it is intended to supply with water, and to make all such preliminary examinations, explorations, measurements and levelings as may be necessary and proper for its corporate purposes, doing thereby as little damage as possible to the owner or owners.

5. Proceedings to assess damages when property taken or used. That in case said corporation cannot agree with the owner or owners, or other persons interested in any lands which said corporation may desire to take, use and occupy, or from which they may desire to take or divert, either in whole or in part, any spring or springs, stream or streams of water for the purposes of its corporation, as to the amount of compensation to be paid to such owner or owners for such taking, use, occupation or diversion, it shall be lawful for any justice of the supreme court of this state, upon application by said corporation, and upon two weeks' pre-

1—Approved April 21, 1876, P. L. 1876, p. 318, c. 193; G. S., 2199.

vious notice, served in person, or by leaving at the dwelling-house or usual place of abode of such owner or owners, or, in case of absence from the state or legal disability published in a newspaper published nearest to the lands in question, to appoint three disinterested commissioners, resident of the county in which said lands are situated, to assess and ascertain the value of the lands so proposed to be taken, used and occupied, and the damages to be done to any lands by the laying down of such pipes and erection and maintenance of such works, and by the diversion, total or partial, as the case may be, of said springs and streams of water; which commissioners shall appoint a time and place at which they shall meet to execute the duties of their appointment, and shall cause two weeks' notice thereof to be given to the parties interested therein, either by personal service or by publication in a newspaper published in the county where such lands may lie; at which time and place the said commissioners shall meet and view the premises and hear the parties interested, and take evidence, if any be offered, and for that purpose shall have power to administer oaths or affirmations, and to adjourn from day to day, and in case of the refusal or failure of either or any of said commissioners to attempt and perform their said duties, the said judge shall have power to appoint another or other disinterested person or persons as commissioners to act in the place of such absent commissioner or commissioners; and the said corporation shall make and exhibit to the said commissioners, at their meeting aforesaid, for the use of the parties interested, a statement and description in writing, or by drawings or maps, or both, of the lands and streams by them sought to be taken or diverted as aforesaid, and of the use, occupation of and excavations upon any lands by them sought to be made; and the said commissioners shall thereupon ascertain and assess the value and damages aforesaid, and shall execute under their hands and seals, or the hands and seals of a majority of them, an award to said corporation of the lands, rights and privileges by them sought in the statements and description aforesaid, stating therein the amount of damages and compensation therefor by them assessed in favor of such owner or owners, which award shall be by them acknowledged and filed in the county clerk's office, and by him recorded in the registry of deeds; provided always, that if any real estate, the owner or owners of which shall not have given his, her or their consent in writing to the diversion or diminution of said springs or streams, or to the damages to which by reason of the diversion or diminution of said springs or streams, shall not have been ascertained and paid pursuant to the directions of this act, shall be injured or damaged by the diversion or diminution of any said springs, that the owner or owners thereof may have and maintain his, her or their action to recover damages for such injury which he, she or they may sustain by reason of anything done under this act as if this act had not been passed.

6. Damages paid before possession. That before taking possession of any such lands, or entering thereon for the purpose of making any excavation or occupation thereof, or by diverting any spring or stream of water, the said corporation shall pay or tender to such owner or owners, or, in case of absence from the state or legal disability, shall deposit with the clerk of the circuit court of said county the amount of damages so awarded; and the award of said commissioners, and the payment or tender or deposit as aforesaid of such damages shall vest in said corporation the lands, rights and privileges by them sought, described and set forth in said statement and description, in all respects the same as if the same had been conveyed to said corporation by said owner or owners under their hands and seals.

7. Proceedings in case of appeal. That if either party feel aggrieved

by said assessment and award, such party may appeal to the next or second term of the circuit court of said county, by petition and notice thereof served upon the opposite party two weeks prior to such term, or published a like space in a newspaper published nearest the lands in question, which petition and notice, so served or published, shall vest in said court full power to hear and determine said appeal, and if required they shall award a venire for a jury to come before them, who shall hear and finally determine the issue under the direction of the court, as in other trials by jury, and it shall be the duty of the said jury to assess the damages to the said lands as above mentioned, and the value of such as shall be absolutely taken; and said court shall have power to order a struck jury, or a jury of view, or both, to try any such appeal; and also to order any jury which may be impaneled and sworn to try any such appeal to view the premises in question during said trial, and the right of said corporation to appeal from and dispute the correctness of any award shall not be waived or taken away by the paying or tendering the amount of the award, and taking possession of the land or exercising the rights covered by such award; and the right of any owner of any such lands or rights in like manner to appeal, shall not be waived or lost by the acceptance of the amount so awarded, when tendered, and upon the final determination of any such appeal the said court shall render such judgment in favor of the one party and against the other as the right and justice of the case shall require, and shall award to the party substantially succeeding and prevailing in said appeal, his, her or their costs of said appeal against the opposite party, and shall have power to enforce the judgment so rendered by execution, as other judgments are enforced, and also by summary proceedings and attachments for non-payment thereof.

8. Directors. That the business of said company shall be managed by a board of directors of not less than five, who shall be stockholders therein, and a majority of whom shall be residents of this state, and a majority of directors chosen shall be a quorum, and there shall be an election of directors within one year from the filing of the articles of association, and annually thereafter at such time as shall be fixed by the by-laws of such company; three weeks' notice thereof shall be given by publication in a newspaper in general circulation in such city, town or village; the stockholders shall be entitled to vote either in person or by proxy.

9. Officers. That the officers of such company shall be a president, who shall be one of the directors, a secretary and treasurer, and such other officers, agents and servants as the board of directors shall deem necessary; such officers shall be elected annually by the directors, and shall be required to give bond with penalty and surety to be approved of by said board of directors, conditioned for the faithful discharge of their respective duties.

10. Capital increased. The amount of the capital stock shall be fixed by the company, but may be increased by a vote of the stockholders at any annual meeting, or at any special meeting; provided, that notice in writing of such special meeting and the object thereof shall be mailed to each stockholder of record at his post-office address at least ten days prior to the holding of such special meeting, and such capital stock shall be divided into shares of not more than one hundred dollars each. (As amended by P. L. 1908, p. 42, c. 28.)

11. Penalty for injuring works. That if any person or persons shall willfully do or cause to be done, any act or acts whatever, thereby to injure any reservoir, conduit-pipe, cock, machine, or structure whatsoever, or anything appertaining to the works of said corporation whereby the same may be stopped, obstructed or injured, the person or persons so

offending shall be considered guilty of a misdemeanor, and being thereof convicted, shall be punished by fine not exceeding three hundred dollars or imprisonment at hard labor not exceeding two years, or both; provided, such criminal prosecution shall not in any wise impair the rights of action for damages by a civil suit, hereby authorized to be brought for any such injury as aforesaid, by and in the name of said corporation in any court of this state having cognizance of the same.

12. May lay pipes free from charge. That such company be and they are hereby fully authorized and empowered to lay their pipes beneath such public roads, streets, avenues and alleys, as they may deem necessary for the purposes aforesaid, free from all charge to be made by any person or persons, or body politic whatsoever, for said privilege, and also such hydrants at the crossings or intersections of said streets and alleys; provided, that the said pipes shall be laid at least three feet below the surface of the same, and shall not in anywise unnecessarily obstruct or interfere with the public travel, or damage public or private property; and provided, that the consent shall be obtained of the corporate authorities, if any there be, of any town through which the same may be laid.

13. May sell water. That said company may sell and dispose of the water issuing from their reservoirs, aqueducts or pipes, for such price or prices, or quarterly or annual rents, and such restrictions as they may think proper.

14. Time for commencing and completing works. That such company shall commence the construction of the proposed water works within six months from the date of their organization, and shall complete the same within two years from the date of commencement.

15. Aqueduct companies may extend works. That any aqueduct company now in existence under any special charter in this state, and any company which has been incorporated under the provisions of this act, shall have the right from time to time to add to and extend their works to such extent as may be necessary to carry out the purposes of its corporation, and for that purpose to take all such lands and divert all such streams of water, in the manner hereinbefore provided, as shall be necessary for that purpose; provided, that nothing in this section shall be deemed, taken or construed to empower or authorize any aqueduct or water company to supply or furnish water within the corporate limits of any city of this state owning or controlling its water-supply. (As amended by P. L. 1888, p. 180, c. 135; G. S., p. 2203.)

16. Time when act takes effect. That this act shall go into effect immediately.

A SUPPLEMENT TO THE ACT ENTITLED "AN ACT FOR THE CONSTRUCTION, MAINTENANCE AND OPERATION OF WATER WORKS, FOR THE PURPOSE OF SUPPLYING CITIES, TOWNS AND VILLAGES WITH WATER," APPROVED APRIL TWENTY-FIRST, ONE THOUSAND EIGHT HUNDRED AND SEVENTY-SIX.¹

1. May issue bonds. Every company organized under the act to which this is a supplement may make and issue bonds, with or without coupons attached, bearing interest not exceeding six per centum per annum, to borrow money or to secure any indebtedness created by them, and sell, exchange or otherwise dispose of the same; and such bonds and the interest thereon may be secured by mortgage or mortgages given or executed to a trustee or trustees for the use of the bondholders, upon the

¹—Approved March 9, 1877, P. L. 1877, p. 114, c. 78; G. S., p. 2202.

corporate franchises, real and personal estate, and all other property of such company or any part thereof; provided, however, that no such corporation shall issue, sell and deliver its bonds, notes or obligations of any character, except in return for cash, to the extent of at least eighty per centum of the face value of said securities issued, or for property of an actual cash value of at least eighty per centum of the face value of the securities issued in payment thereof. (As amended by P. L. 1883, p. 204, and P. L. 1908, p. 43, c. 29.)

2. Time when act takes effect. That this act shall take effect immediately.

A SUPPLEMENT TO AN ACT ENTITLED "AN ACT FOR THE CONSTRUCTION, MAINTENANCE AND OPERATION OF WATER WORKS FOR THE PURPOSE OF SUPPLYING CITIES, TOWNS AND VILLAGES OF THIS STATE WITH WATER," APPROVED APRIL TWENTY-FIRST, EIGHTEEN HUNDRED AND SEVENTY-SIX.¹

1. May extend mains beyond limits of city. That it shall and may be lawful for any aqueduct or water company organized under the act to which this is a supplement, or specially chartered for the purpose of supplying any city, borough or town with water, to extend its mains outside and beyond the corporate limits of such city, borough or town, along any road or street leading therefrom, for the purpose of supplying the dwellers along such road or street with water, provided a majority in frontage of the owners of land fronting on such road or street, or of any portion thereof, proposed to be supplied, shall consent thereto in writing.

2. Time when act takes effect. That this act shall take effect immediately.

A SUPPLEMENT TO AN ACT ENTITLED "AN ACT FOR THE CONSTRUCTION, MAINTENANCE AND OPERATION OF WATER WORKS FOR THE PURPOSE OF SUPPLYING CITIES, TOWNS AND VILLAGES OF THIS STATE WITH WATER," APPROVED APRIL TWENTY-FIRST, ONE THOUSAND EIGHT HUNDRED AND SEVENTY-SIX.²

1. Contracts with other companies. It shall be lawful for any company incorporated under the act to which this is a supplement, to make and enter into a contract with any other company organized under any law of the state for a supply of water upon such terms and for such times as may be mutually agreed upon; and said companies so contracting may lay such supply mains and pipes as may be thought necessary to furnish said supply, through any property, upon obtaining the consent in writing of the owner thereof; or under the surface of any streets, roads, highways or public places; provided, that said companies first obtain the consent by ordinance of the municipality or municipalities through which said mains and pipes are to be laid; provided, however, the municipal board or body having control of such streets, roads, highways or public places shall designate the place therein where and the manner how such pipes or mains shall be laid.

2. Time when act takes effect. This act shall take effect immediately.

1—Approved March 23, 1883, P. L. 1883, p. 201, c. 152; G. S., p. 2202.

2—Approved April 8, 1903, P. L. 1903, p. 237, c. 154.

A SUPPLEMENT TO AN ACT ENTITLED "AN ACT FOR THE CONSTRUCTION, MAINTENANCE AND OPERATION OF WATER WORKS FOR THE PURPOSE OF SUPPLYING CITIES, TOWNS AND VILLAGES OF THIS STATE WITH WATER," APPROVED APRIL TWENTY-FIRST, EIGHTEEN HUNDRED AND TWENTY-SIX.¹

1. Consent to incorporators. Hereafter the consent in writing of the corporate authorities as required by the second section of the act to which this act is a supplement, shall be to the individual incorporators of the proposed company, in and by their individual names.

2. Consents validated. All consents heretofore given, either to the individual incorporators of a proposed company in and by their individual names, or to a proposed company in and by its proposed corporate name are hereby validated, ratified and confirmed where such company has filed its certificate of incorporation and such consent in the office of the secretary of state and such company has constructed, maintained and operated water works and supplied water.

A SUPPLEMENT TO AN ACT ENTITLED "AN ACT FOR THE CONSTRUCTION, MAINTENANCE AND OPERATION OF WATER WORKS FOR THE PURPOSE OF SUPPLYING CITIES, TOWNS, TOWNSHIPS, VILLAGES, BOROUGHES AND OTHER MUNICIPALITIES IN THIS STATE WITH WATER," APPROVED APRIL TWENTY-FIRST, ONE THOUSAND EIGHT HUNDRED AND SEVENTY-SIX.²

1. Formation of water company validated. The formation of any company which has heretofore filed a certificate of incorporation, as required by the second section of the act to which this act is a supplement, is hereby validated, ratified and confirmed, wherever there has been filed with the certificate of incorporation a copy of the ordinance or resolution of the governing body of the municipality to be supplied with water, consenting to the formation of such company, certified to by the clerk of such municipality, and such certified copy shall be deemed to be the consent in writing of the corporate authorities as required by said act; provided, that such company has constructed, maintained and operated water works and supplied water.

AN ACT IN RELATION TO WATER COMPANIES.³

1. Rents paid in advance refunded on failure to supply water. That in case any incorporated water company of this state, who have by agreement or otherwise collected water rents in advance, shall fail for more than five days at any one time during any period for which such rent is charged, collected or received, to supply water to the person who has paid such rents in advance, such water company shall refund to such consumer a portion of such rent proportioned to the time of such non-supply; provided, nothing in this act shall apply to any city or town where the water works are owned and controlled by the city or town authorities.

2. Word "consumer" construed. That the word "consumer" in the first section of this act shall be construed to include individuals, firms, pri-

1—Approved April 2, 1906, P. L. 1906, p. 98, c. 68.

2—Approved April 8, 1909, P. L. 1909, p. 91, c. 66.

3—Approved April 8, 1878, P. L. 1878, p. 331, c. 213; G. S., p. 2205.

vate, public and municipal corporations furnished with water for any purpose other than that of motive power, by any incorporated water company.

3. Time when act takes effect. That this act shall take effect immediately.

AN ACT TO AUTHORIZE MUNICIPAL CORPORATIONS OWNING OR CONTROLLING WATER WORKS TO MAKE CONTRACTS TO FURNISH WATER FOR PUBLIC OR PRIVATE USES WITH ANY ADJOINING MUNICIPALITY OR WITH ANY PRIVATE CORPORATION THEREIN.¹

1. Contract for water supply. It shall be lawful for the board of aldermen, common council, board of water commissioners or other governing body of any municipal corporation in this state owning or controlling waterworks, to enter into and make a contract or contracts with any adjoining municipal corporation or with any private corporation therein, to furnish a supply of water for public or private uses for a year or a term of years.

2. Time limit on contract. Where said water-works are under the control of a board of water commissioners, no contract shall be made for a term exceeding three years without the consent of the governing board of the city owning said water-works.

AN ACT IN RELATION TO THE FURNISHING, SUPPLYING AND USE OF WATER WITHIN THE LIMITS OF MUNICIPALITIES IN THIS STATE MAINTAINING OR OPERATING A PUBLIC WATER-SUPPLY, WHETHER OR NOT THE SUPPLY OF WATER FURNISHED BY THE MUNICIPALITY IS OBTAINED BY CONTRACT OR IS FROM A PLANT OWNED AND CONTROLLED BY THE MUNICIPALITY.²

1. Control of water supply. It shall not be lawful for any person, firm or corporation to supply water to any other person, firm or corporation by means of water pipes or conduits conveying water obtained from without the limits of any municipality operating or maintaining a public water-supply, whether or not the supply of water furnished by such municipality is obtained by contract or is from a plant owned and controlled by such municipality, for use within the limits of such municipality, without the consent of the board of authority having charge of the water-supply of any such municipality.

2. Obtaining water outside municipality by consent. It shall not be lawful for any person, firm or corporation within the limits of any municipality maintaining or operating a public water-supply, whether or not the supply of water furnished by the municipality is obtained by contract or is from a plant owned and controlled by the municipality, to obtain water by means of pipes or conduits from any source outside the limits of such municipality for use or consumption within such municipality without the consent of the board of authority having charge of the said public water-supply in such municipality.

3. Injunction. Any such municipality may maintain an action at law or in equity to enjoin the violation of any of the provisions of this act.

4. Time when act takes effect. This act shall take effect immediately.

1—Approved April 16, 1897, P. L. 1897, p. 232, c. 128.

2—Passed October 11, 1907, P. L. 1907, p. 676, c. 265.

AN ACT CONCERNING THE LAYING OR MAINTAINING OF WATER PIPES OR CONDUITS FOR SUPPLYING WATER FOR DOMESTIC, MANUFACTURING OR OTHER USES IN CITIES OF THE FIRST CLASS IN THIS STATE, AND REGULATING THE SAME.¹

1. Consent to lay water pipes. It shall be unlawful for any person or corporation other than a municipal corporation to lay or maintain any water pipes or conduits for the supplying of water for domestic or manufacturing or other uses in, through, under or over any street, avenue or highway within the limits of any city of the first class in this state without first obtaining the consent of such municipality by ordinance passed by the board or body having control of the streets, avenues or highways of such municipality, and approved by the mayor or executive officer of such municipality.

2. Conditions stated in ordinance. Where any such city of the first class shall give its consent to the laying or maintenance of any water pipes or conduits, as provided for in the first section of this act, such ordinance shall state the terms and conditions under which said pipes or conduits shall be laid or maintained.

3. Enforcement of act. Any such municipality may maintain an action at law or in equity to enforce the provisions of or enjoin the violation of any of the provisions of this act.

4. Repealer. All acts or parts of acts inconsistent with this act are hereby repealed, and this act shall take effect immediately.

AN ACT TO ESTABLISH A STATE WATER-SUPPLY COMMISSION, AND TO DEFINE ITS POWERS AND DUTIES, AND THE CONDITIONS UNDER WHICH WATERS OF THIS STATE MAY BE DIVERTED.²

1. General duties. The governor, by and with the advice and consent of the senate, shall appoint five citizens of this state to constitute a commission to be known as the State Water-Supply Commission. The commission shall make necessary rules and regulations for the performance of its duties. It shall be charged with a general supervision over all the sources of potable and public water-supply, to the end that the same may be economically and prudently developed for the use of the people of this state.

2. Plans submitted to commission. No municipal corporation, corporation or person engaged in supplying or proposing to supply the inhabitants of any municipal corporation with water, shall have power to condemn lands or water for any new or additional source of water-supply, or to divert water from such new or additional source until such municipal corporation, corporation or person has first submitted descriptions thereof, which may be accompanied by maps and plans to said commission, and until said commission shall have approved the same; provided nothing in this section shall be interpreted to restrict any municipality in acquiring by purchase or condemnation, any existing or operating water works supplying said municipality with water; and provided further, that where any such municipal corporation, corporation or person has already acquired lands or water, and has in good faith commenced the construction of works for such new or additional water-supply, this section shall not apply to construction or lands or water necessary to complete such works, or to put in use such water-supply, if maps, plans and description of such lands, works and water-supplies

1—Approved April 15, 1908, P. L. 1908, p. 585, c. 282.

2—Approved June 17, 1907, P. L. 1907, p. 633, c. 252.

shall be filed with the commission within ninety days of the approval of this act. Nothing in this act contained shall be construed to take from any municipality in this state the right to use and take all the water which it has the right to use or appropriate by purchase or condemnation.

3. Approval of plans; proceeding. Any municipal corporation, corporation or person may make application by petition, in writing, to the said commission for the approval of its plans for obtaining such new or additional source of water-supply, which application shall show the sources of the proposed supply, the approximate location of the proposed reservoirs or other works, with their estimated capacities, an abstract of any official reports relating to the same, and showing the need for an added supply, and the reasons for the choice made. The commission shall thereupon give notice, by advertisement in one or more newspapers published in the vicinity, of a public hearing, at which all persons or municipalities affected by the proposed plans may be heard for or against the granting of the application. After due hearing, the commission shall decide whether the plans proposed are justified by public necessity or reasonably anticipated public use, and whether such plans interfere unduly with the opportunity of other municipalities to obtain a water-supply by the taking of waters necessary for their use, or whether the reduction of the dry-season flow of any stream will be caused to an amount likely to produce unsanitary conditions or otherwise unduly injure public or private interests. Such commission shall, within ninety days after receiving the application, and with all convenient speed, either approve such application, reject it entirely, or approve the same subject to such reasonable terms and conditions as the commission may prescribe. The decision of the commission upon any such application shall be in writing and signed by at least a majority of its members, and shall be filed, together with the application and all plans, maps, surveys and other papers or records relating thereto, in its office, and a copy of the decision certified under seal of the commission shall be forthwith served upon the applicant or his attorney or agent named in the application, which copy shall be evidence in all courts and places. The approval of the commission shall constitute the state's assent to the diversion of water and the construction and operation of the water-works in accordance with the terms of the decision and the plans filed therewith. The decisions of the commission shall at all times be subject to review by the courts for reasonableness, legality or form.

4. Attendance of witnesses. The commission shall have power to subpoena and require the attendance before it of witnesses, and the production of books and papers pertinent to the investigation and inquiries which it is by this act authorized to make, and to examine them or such public records as it shall require in relation thereto. In the event of any person or corporation refusing to obey said subpoena he or it may be punished as for contempt of the supreme court, on application by petition to a justice of said court.

5. Annual report; water metered. The commission shall also have power to require annual reports from all municipal corporations, corporations or persons diverting water for water-supply purposes, as to the amount of water diverted by them, the communities and population supplied, the rates charged, and such other matters as shall be requisite to a proper supervision of the water supplies of the state and the development and public use thereof. It shall be the duty of the officers in control of municipal or other water-works to keep accurate records, by meters or other approved methods, of the amount of water used, and to report the same quarter yearly to said commission. The commission shall also have power to make such investigations of the meters and records

of said corporations of the water diverted as may be necessary to determine all matters pertinent to their duties. It shall also have power to examine the plants and works of all public water-supplies in the state, to aid it in ascertaining the sources of the supply.

6. Commissioners; salaries; powers, etc. The commission shall have an official seal. The term of each member thereof shall be for five years, except that the members of the said commission first appointed shall hold office, respectively, one for one year, one for two years, one for three years, one for four years and one for five years. The members of the commission shall receive an annual salary of two thousand five hundred dollars each, to be paid monthly by the state treasurer, and be paid their necessary and reasonable expenses actually incurred in the prosecution of their duties. The commission is hereby authorized and empowered to employ a secretary and such engineers, clerks and subordinates as the duties imposed upon it by this act may require, and to fix and pay the reasonable salaries and expenses of such subordinate officers for the purposes of this act. All expenses incurred by said commission shall be paid, by the state treasurer, on warrant of the comptroller, out of moneys to be annually appropriated for the purpose upon vouchers duly approved by the president and attested by the secretary of the commission.

7. Annual report of commission. The commission shall annually, on or before the thirtieth day of November of each year, submit a written report in detail of its proceedings during the preceding year to the governor.

8. Payment to state for waters diverted; water rates; payment; collection; delinquents, etc. Every municipality, corporation or private person now diverting the waters of streams or lakes with outlets for the purpose of a public water-supply shall make annual payments on the first day of May to the state treasurer for all such water hereafter diverted in excess of the amount now being legally diverted; provided, however, no payment shall be required until such legal diversion shall exceed a total amount equal to one hundred (100) gallons daily, per capita for each inhabitant or the municipality or municipalities supplied, as shown by the census of one thousand nine hundred and five. And every municipality, corporation or private person not at present diverting surface waters for said purpose, but who shall hereafter divert such waters, shall make annual payments on the first day of May to the state treasurer for all waters diverted in excess of a total of one hundred (100) gallons daily for each inhabitant of the municipality or municipalities supplied, as shown by the census of one thousand nine hundred and five. Such payment shall be deemed to be a license and its amount shall be fixed by said commission at a rate of not less than one dollar (\$1.00) or more than ten dollars (\$10.00) per million gallons. If at all times an amount equal to the average daily flow for the driest month, as shown by the existing records, or in lieu thereof one hundred and twenty-five thousand gallons daily for each square mile of unappropriated watershed above the point of diversion, shall be allowed to flow down the stream, the commission shall fix the minimum rate and may increase the rate proportionally as a less amount is allowed to flow down the stream below the point of diversion, due account being taken in fixing said increase both of the duration and amount of said deficiency; provided, however, the aforesaid one hundred and twenty-five thousand gallons daily for each square mile of unappropriated watershed shall be additional to the dry-season flow or any part thereof which may be allowed to flow down for any appropriated watershed or watersheds above said point of diversion. Water diverted within the corporate limits of a

municipality for manufacturing and fire purposes only, and returned without pollution to the stream from which it was taken within said corporate limits shall not be reckoned in making up the aggregate amount diverted. Said commission shall certify to the state comptroller, as soon as practicable after the first day of January, and not later than the fifteenth day of February of each year, the names of all municipalities, corporations or private persons owing money to the state for the diversion of water during the preceding year, with the amount so due. The state comptroller shall promptly notify said municipalities, water companies or private persons of their indebtedness to the state, and in case said amounts are not paid the state treasurer on or before the first day of July of the same year, the state comptroller shall certify to the attorney-general for collection the names of such delinquent municipalities, water companies or private persons and the amounts due from each, and it shall be the duty of the attorney-general to take immediate steps to collect the same in the name of the state. Any party aggrieved by the action of the commission, upon filing written complaint on or before March twentieth, shall be heard and permitted to give evidence of the facts, and the sum fixed may be changed, reduced or canceled, as the facts may warrant. All sums received as above provided shall be credited by the state treasurer to a special fund, to be used by said commission as the legislature may direct for the control of the waters and conservation of the water-supplies of the state. The provisions herein contained as to payment to the state for water diverted from surface sources shall not apply to water obtained from wells. Nothing in this act shall be construed to confer upon any municipality, corporation or person any franchise not already possessed by said municipality, corporation or person, but the approval of the said commission contained in its decision as above provided shall constitute the assent of the state to the diversion of water as against the state in accordance with the terms of said decision.

9. Examination of reservoirs. The said commission, with the assistance of expert engineers, shall examine the plans for storage or other reservoirs heretofore or hereafter made by any bureau, department or commission of the state, and shall advise the legislature, as soon as practicable, as to the need of such reservoir or reservoirs; which plans best meet these needs; the benefits, cost of construction and maintenance thereof; the revenue to be derived therefrom and methods by which such plans may be carried out. It shall be the duty of every such bureau, department or commission to furnish said Water-Supply Commission all information in its possession regarding their respective plans, in order that said Water-Supply Commission may be able to take full advantage of all surveys, estimates and investigations theretofore made. The sum of ten thousand dollars is hereby appropriated to pay the expenses of the investigations in this section referred to. Nothing in this act shall be construed to authorize the commission to grant to any private corporation or persons the right to construct either of the reservoirs heretofore proposed for flood control in the Passaic river.

10. Repealer. All acts and parts of acts inconsistent with this act be and the same are hereby repealed, and this act shall take effect immediately.

A SUPPLEMENT TO AN ACT ENTITLED "AN ACT TO ESTABLISH A STATE WATER-SUPPLY COMMISSION AND TO DEFINE ITS POWERS AND DUTIES, AND THE CONDITIONS UNDER WHICH THE WATERS OF THIS STATE MAY BE DIVERTED," APPROVED JUNE SEVENTEENTH, ONE THOUSAND NINE HUNDRED AND SEVEN.¹

1. Jurisdiction. The State Water-Supply Commission shall have the same jurisdiction and supervision over well, sub-surface or percolating water-supplies now or hereafter furnished to the inhabitants of any municipal corporation as it now has over surface water-supplies so furnished, except as such jurisdiction and supervision may be herein modified.

2. Approval of commission necessary to acquire water rights. No municipal corporation, corporation or person now engaged in supplying or hereafter proposing to supply the inhabitants of any municipal corporation with water, either from surface, sub-surface, well or percolating sources, shall have power to condemn lands or water for or divert from any new or additional source of water-supply, until it shall have first submitted to the commission descriptions thereof, which may be accompanied by maps and plans, and the commission shall have approved the same. Nothing in this section shall restrict any municipality in acquiring by purchase or condemnation, any water-works supplying the municipality. Where any municipal corporation, corporation or person has already acquired lands or water and in good faith commenced the construction of works for a new or additional water-supply for the inhabitants of any municipality within the state, this section shall not apply to construction or lands or water necessary to complete the works, or put the same in use if maps, plans and descriptions of the lands, works and water supplies be filed with the commission within ninety days after the approval of this act. No municipality shall be deprived of its right to use and take the water which it now has the right to use or appropriate by purchase or condemnation.

3. Application for approval of plans. Any municipal corporation, corporation or person may make application in writing to the commission for approval of its plans for obtaining a new or additional source of water-supply from surface or sub-surface, well or percolating source. The application shall show the sources of proposed supply, the approximate location of the proposed wells, reservoirs or other works, with their estimated capacities, an abstract of any official reports relating to the same, the need for an added supply, and the reasons for the choice made. The commission shall give notice, by advertisement in one or more newspapers published in the vicinity, of a public hearing, at which all persons or municipalities affected by the proposed plans may be heard for or against the granting of the application. After such hearing, the commission shall decide whether the plans proposed are justified by public necessity or reasonably anticipated use, and whether by taking waters necessary for this use they interfere unduly with the opportunity of other municipalities to obtain for themselves a water-supply, or whether the taking of sub-surface waters will unduly injure public or private interests. Within ninety days after receiving the application the commission shall, with all convenient speed, either approve or reject the same or approve it subject to such reasonable terms and conditions as it may prescribe. The decision upon any application shall be in writing, signed by at least a majority of the members of the commission, and shall be filed, together with the application and all plans, maps, surveys and other papers or records relating thereto, in its office. A copy

¹—Approved April 12, 1910, P. L. 1910, p. 551, c. 304.

of the decision, certified under the seal of the commission, shall be forthwith delivered to the applicant or his attorney or agent named in the application and shall be evidence in all courts and places. The approval of the commission shall constitute the state's assent to the diversion of water either surface, sub-surface, well or percolating for use within the state, and the right to construct and operate the water-works in accordance with the terms of the decision and the plans filed therewith. The decision of the commission shall at all times be subject to review by the courts for reasonableness, legality and form.

4. Power to subpoena. The commission shall have power to subpoena and require the attendance before it of witnesses, and the production of books and papers pertinent to the investigation and inquiries which it is by this act authorized to make, and to examine them or such public records as it shall require in relation thereto. In the event of any person or corporation refusing to obey said subpoena, he or it may be punished as for contempt of the supreme court on application by petition to a justice of said court.

5. Granting permission to exercise right of eminent domain. Whenever application is made to the State Water-Supply Commission in conformity with this act or the act to which this act is a supplement, by any municipal corporation, or whenever any municipal corporation now legally engaged in diverting and supplying water, either surface, sub-surface, well or percolating, to the inhabitants of any municipal corporation shall request the commission by petition in writing for permission to exercise the right of eminent domain for the acquisition of the necessary lands and water rights, either in case of surface, sub-surface, well or percolating waters, for the purpose of diverting the same for the supply of the inhabitants of any municipal corporation, the commission may in its discretion, grant such permission, first being satisfied that it is for the public interests so to do, and after such permission is granted the necessary lands, water rights and interests in lands and water rights affected may be condemned by the applicant in the manner now provided by law.

6. Expenses paid by municipality. Where application is made to the State Water-Supply Commission for the institution of proceedings to acquire rights to divert in conformity with this act, all expenses of the State Water-Supply Commission in connection with such proceedings shall be paid by the municipal corporation making the application; and in the case of surface water-supplies, payment to the state shall be made in conformity with the act to which this act is a supplement, but in case of condemnation of sub-surface, well or percolating supplies, there shall be charged by the state a fee of one dollar per million gallons from that portion of the supply for the acquisition of which the state's right of eminent domain is exercised for all water diverted, which charge shall be certified by the commission to the state comptroller, and its collection enforced in the same manner as provided for in the act to which this act is a supplement in the case of charge for excess diversion for surface water-supplies.

7. Municipal reports to commission. The commission shall have power to require annual reports from all municipal corporations, corporations or persons diverting water either from surface, sub-surface, well or percolating sources or from a combination of any such sources for water-supply purposes, as to the amount of water diverted by them, the proportional amount from each source, the communities and populations supplied, the rates charged, and such other matter as shall be requisite to a proper supervision of the water-supplies of the state and the development and public use thereof. It shall be the duty of the officers in control of municipal or other water-works to keep accurate records,

by meters or other approved methods, of the amount of water used, and to report the same quarter-yearly to said commission. The commission shall also have power to make such investigations of the meters and records of said corporation of the water diverted as may be necessary to determine all matters pertinent to their duties. It shall also have power to examine the plants and works of all public water-supplies in the state, to aid it in ascertaining the sources of the supply.

8. Time when act takes effect. This act shall take effect immediately.

A SUPPLEMENT TO AN ACT ENTITLED "AN ACT TO ASCERTAIN THE RIGHTS OF THE STATE AND OF THE RIPARIAN OWNERS IN THE LANDS LYING UNDER THE WATERS OF THE BAY OF NEW YORK AND ELSEWHERE IN THE STATE," APPROVED APRIL ELEVENTH, ONE THOUSAND EIGHT HUNDRED AND SIXTY-FOUR.¹

1. Consent of riparian board to lay pipes under tidal waters. It shall be unlawful for any person or corporation to lay any pipe or pipes on any of the lands of the state lying under tidal waters without the consent or permission of the governor and the board of riparian commissioners of this state first had and obtained in writing; provided, that nothing in this act contained shall be construed to apply to lands under the waters of the Atlantic ocean.

2. Time when act takes effect. This act shall take effect immediately.

12. WORKINGMEN'S CO-OPERATIVE SOCIETIES.

AN ACT TO PROVIDE FOR THE FORMATION AND REGULATION OF CO-OPERATIVE SOCIETIES OF WORKINGMEN.²

1. Formation of society authorized. It shall be lawful for any number of persons, not less than seven, residents in this state, to associate themselves into a society for the purpose of carrying on any lawful mechanical, mining, manufacturing or trading business, or for the purpose of trading and dealing in goods, wares and merchandise or chattels, or for the purpose of buying, selling, mortgaging, settling, owning, leasing and improving real estate and erecting buildings thereon, within this state, upon making and filing a certificate of association, in writing, in manner hereinafter mentioned, and as such shall be deemed to be a corporation, and to possess all the powers incident thereto. (As amended by P. L. 1908, p. 534, c. 255.)

2. What certificate of association shall set forth. That such certificate of association shall set forth:

I. The name assumed to designate such society and to be used in its business and dealings, which name shall have the word "co-operative" as a distinguishing part thereof, but shall in no respect be similar to that of any other society organized under this act.

II. The place or places in this state where the business of such society is to be conducted and the location of the principal office of the same.

III. The objects for which the society shall be formed.

IV. The total amount of capital stock of such society, the number of shares into which the same is divided, the par value of each share, the manner in which the installments on the shares shall be paid, the num-

1—Approved April 7, 1910, P. L. 1910, p. 154, c. 103.

2—Approved March 10, 1884, P. L. 1884, p. 63, c. 38; G. S., p. 894.

ber of shares subscribed, and the amount actually paid in cash on account of the same.

V. The terms of admission of the members.

VI. Mode of application of profits.

VII. The mode of altering and amending the certificate of association and the by-laws of the society.

3. Certificate executed. That the said certificate of association shall be signed by the persons originally associating themselves together, and shall be proved or acknowledged by at least seven of them, before an officer qualified to take acknowledgments of deeds of real estate, and after being approved by the chief of the bureau of statistics of labor and industries, shall be recorded in the office of the clerk of the county where the principal office or place of business of such society shall be established, and a copy of such certificate shall be filed in the office of the chief of the bureau of statistics of labor and industries.

4. Business managed by directors. That the business of every such society shall be managed and conducted by a board of not less than five directors, who shall respectively be members of said society, and shall be annually elected at such time and place as shall be provided in the by-laws of the society, and one of such directors shall be chosen president and one of them shall be chosen treasurer, and such directors and officers shall hold their respective offices until their successors are duly qualified; and that such society shall also have a secretary and such other officers, agents and factors as may be necessary to carry on its business, and shall choose them in the manner prescribed in the by-laws thereof.

5. First meeting of society. That the first meeting of such society shall be called by a notice signed by a majority of the persons named in the certificate of association, and designating the time, place and purpose of the meeting, and shall be personally served on all the persons signing said certificate or by advertisement in a newspaper published in the county where such society shall have been incorporated, if such personal service cannot be made; and at such meeting so called, or at any adjourned meeting thereof, a majority of the persons so signing shall constitute a quorum for the transaction of business, and shall have power to elect the directors and other officers provided for in section fourth (4) of this act, who shall serve until their successors duly qualify, and to adopt by-laws, rules and regulations for the government of such society.

6. What by-laws shall provide. That the by-laws of such society shall provide:

I. For an annual meeting of the members thereof, and such other regular and special meetings as may be deemed desirable, the number of members necessary to constitute a quorum for the transaction of business and the right of voting at the same.

II. For the election of directors and other officers, agents and factors, and their respective powers and duties.

III. For the limitation of the amount of such real and personal estate as the purposes of the society shall require.

IV. Whether the shares, or any number of them, shall be transferable, and in case it be determined that the same shall be transferable, provision for their transfer and registration, and the consent of the board of directors to the same; and in case it be determined that the shares shall not be transferable, provision for paying to members the balance due to them on withdrawal or of paying nominees in cases hereinafter mentioned.

V. How members may withdraw from the society.

VI. Whether and by what authority any part of the capital may be

invested in or on security of another society through which its products are disposed of or its supplies secured.

VII. Whether and to what extent credit in its business transactions may be given or taken.

VIII. In what sum and with what sureties the treasurer and other fiduciary officers or agents shall give bonds for the faithful performance of their respective duties.

IX. For the audit of accounts.

X. For the distribution of the net profits.

XI. For the custody, use and device of the seal, which shall bear the corporate name of the society.

7. Name of society to be kept on outside of place of business. That every society incorporated under this act shall paint or affix and shall keep painted or affixed, its name on the outside of every office or place in which the business of the association is carried on, in a conspicuous position in letters easily legible.

8. To have a registered office. That every society incorporated under this act shall have a registered office to which all communications and notices may be addressed, and notices in writing of the location of such office, and of any change therein, shall be filed with the chief of the bureau of statistics of labor and industries, and in the office of the clerk of the county where the office of such society is located.

9. Issue of shares of capital stock. That the capital stock of such society shall be divided into shares the par value of which shall not be more than fifty (50) dollars, and no share shall be issued for less than its par value; and that no certificate of shares shall be issued to any member until the shares are fully paid up.

10. Voting; limit of stock ownership. That no member of such society shall be entitled to more than one vote upon any subject, which vote must be cast in person; and that the board of directors shall have power, unless otherwise provided in the by-laws of the society, to fix and regulate the number of shares to be held by any one member.

11. May hold interest in other society. That any society incorporated under this act may hold in its corporate name any amount of interest in any other society through which its products are disposed of or its supplies secured; provided, that such interest so held shall not exceed one-third in value of the paid-up capital of the society holding said interest.

12. Annual statement to be made and filed. That the board of directors of every society incorporated under this act shall annually make a statement in writing of the condition of such society, setting forth the amount of capital stock, the number of shares issued and the par value thereof, the number of stockholders and the number of shares held by each, the amount and character of the property of the society and of its debts and liabilities; and that said statement shall be signed and sworn to by a majority of directors, including the treasurer, and filed in the office of the clerk of the county where the principal office of such society is located, and that immediately thereafter a copy of such statement shall be forwarded to the chief of the bureau of statistics of labor and industries, who, if he shall have reason to doubt the correctness of such statement, or upon the written request of five members of such society, shall cause an examination of the books and affairs of such society to be made and render a correct statement to the members thereof; and every member or creditor thereof shall be entitled to receive from the secretary a copy of such annual statement; and every director or other officer refusing to comply with the requirements of this section, or making and signing a false annual statement of the condition of the society,

shall forfeit for each offense the sum of one hundred dollars, to be recovered in an action of debt in any court of competent jurisdiction in this state by any member or creditor of the society who shall sue for the same.

13. Any member may inspect books. That any member or other person having an interest in the fund of any such society may inspect the books thereof, at all reasonable hours, at the office thereof.

14. Distribution of profits. That there shall be such distribution of the profits of such society, among the workmen, purchasers and members, as shall be prescribed in the certificate of association, at such times as therein prescribed, as often at least as once in twelve months; provided, that no such distribution shall be made until a sum equal to five per centum of the net profits shall have been appropriated for a contingent or sinking fund, and that such appropriation shall continue to be made until there shall be accumulated a sum equal to thirty per centum of the capital stock of such society.


15. Member may nominate person to whom shares shall be transferred at death. That any member of such society, by a writing under his hand, delivered at the office of the society, may nominate any person, being the husband, wife, father, mother, child, brother, sister, nephew or niece or other relative of such member, to whom his or her share or shares of the capital stock of the society shall be transferred at his or her decease, and from time to time may revoke or vary such nomination, by a writing similarly delivered; and such society shall keep a book, wherein the names of all persons so nominated, and the number of shares to be transferred shall be recorded; provided, nevertheless, that in lieu of making such transfer, the society may provide for payment to all such nominees of the full value of shares intended to be transferred; provided, also, that if by the by-laws of the society the shares are transferable, this section shall not be construed to forbid the transfer of such shares by sale or will or otherwise subject to the consent of the board of directors.

16. Dissolution of society. That any such society may be dissolved in the manner in which any other corporation may be dissolved under existing laws.

17. When whole capital stock to be paid in. That where the whole capital of such society shall not have been paid in, and the assets of such society shall be insufficient for the payment of its debts, liabilities and obligations, each stockholder shall be bound to pay on each share held by him the sum necessary to complete the amount of such share, as fixed in the certificate of association, or such proportion as shall be required to satisfy such debts, liabilities and obligations; provided, however, that no such contribution shall be required from any person after the expiration of one year from the time he has ceased to be a member, or for any debt, liability or obligation contracted after he has ceased to be a member of such society.

18. Repealer. That an act entitled "An act to encourage the organization and regulate co-operative associations of workmen," approved March twenty-second, one thousand eight hundred and eighty-one, be and the same is hereby repealed, but no association established under said act, or any person having claims or demands against such association, shall be affected by the repeal thereof, but in respect to such association the same act shall still be in full force and effect; provided, however, that any such association may come under and be subject to the provisions and liabilities of this act, in the same manner as if formed under the same, if such association make and file the certificate of association required by this act.

19. Time when act takes effect. That this act shall take effect immediately.



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